

**IN THE**  
**Supreme Court of the United States**

---

**October Term, 1972.**

**No. 72-481.**

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**DEPARTMENT OF GAME of the STATE OF WASHINGTON,**

**v.**

**THE PUYALLUP TRIBE, INC., *et al.***

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**No. 72-746.**

**THE PUYALLUP TRIBE, INC., *et al.***

---

**v.**

**DEPARTMENT OF GAME of the STATE OF WASHINGTON.**

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**ON WRITS OF CERTIORARI TO THE SUPREME COURT  
OF WASHINGTON**

**No. 72-481—PETITION FOR CERTIORARI FILED  
SEPTEMBER 21, 1972**

**No. 72-746—PETITION FOR CERTIORARI FILED  
NOVEMBER 20, 1972**

**CERTIORARI GRANTED MARCH 19, 1973**

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## EXPLANATION OF RECORD DESIGNATION

This is the second time that this matter will be before the United States Supreme Court. This Court has already issued its opinion in *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968).

Counsel have been advised by the office of the Clerk of the United States Supreme Court that the original printed appendix of the record to the prior opinion is available for the Court's information under the designation of *Puyallup Tribe v. Department of Game of Washington, et al.*, October Term 1967, Docket No. 247, Volume 57, Transcript of Record and Briefs. Inasmuch as remand proceedings were held pursuant to that opinion, the original Docket No. 247 record will be cited as Rs. and the remand record contained in this appendix will be cited as Re.

For the convenience of the Court, the complete index to the original Docket No. 247 appendix (designated as Rs.) and the index to the remand proceeding (designated as Re.) will be printed on the immediately following pages.

Counsel for the Federal Government, respondent, the Washington Department of Fisheries, respondent, and the Washington Department of Game have agreed on the material to be designated as the remand record contained in this appendix.

Submitted by:  
SLADE GORTON,  
*Attorney General*

JOSEPH L. CONIFF, JR.,  
*Assistant Attorney General.*  
Counsel of Record for Ap-  
pellant, Washington Depart-  
ment of Game

# RELEVANT DOCKET ENTRIES

## DOCKET NO. 247, OCT. TERM, 1967

DATE	PROCEEDINGS	APPENDIX PAGE NOS.
1963		
Nov. 12	Complaint filed .....	Rs 5
Nov. 12	Temporary restraining order entered by Superior Court (trial court) restraining the Puyallup Indians from fishing within the exterior boundaries of the Puyallup Indian Reservation and at their usual and accustomed grounds and stations .....	Rs 7
1963		
Dec. 3	Return on temporary restraining order and order to show cause on behalf of the Puyallup Tribe of Indians filed by defendant which was an answer to plaintiffs' complaint and motion to dismiss the restraining order and complaint raising question of jurisdiction .....	Rs 8
1965		
May 27	Trial court filed its Memorandum of Opinion finding that a permanent injunction should be entered against the defendants .....	Rs 11
Aug. 13	Trial court entered its Findings of Fact and Conclusions of Law .....	Rs 30
Aug. 13	Trial court entered the judgment and decree permanently enjoining the Puyallup Indian Tribe from fishing the Puyallup River and Commencement Bay in any manner contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fish-	

DATE	PROCEEDINGS	APPENDIX PAGE NOS.
	eries of the State of Washington and the Department of Game of the State of Washington .....	Rs 37
Sept. 7	Notice of Appeal from Superior Court (trial court) to Washington State Supreme Court .....	Rs 38
1967		
Jan. 12	The Washington Supreme Court rendered its opinion .....	Rs 39
Mar. 15	Remittitur issued by the Washington State Supreme Court which made the judgment of the Washington Supreme Court final as of March 13, 1967 .....	Rs 68
June 2	The Pierce County Superior Court (trial court) in its ministerial function entered the final order (Amended injunction) pursuant to the direction of the Washington Supreme Court wherein the Puyallup Tribe was permanently enjoined from drift net or set net fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington (the area referred to by said order includes that area within the exterior boundaries of the Puyallup Indian Reservation and at the usual and accustomed fishing station under the Medicine Creek Treaty) .....	Rs 69
June 12	Petition for Writ of Certiorari filed with the United States Supreme Court.	

DATE PROCEEDINGS

APPENDIX  
PAGE NOS.

Dec. 18 The United States Supreme Court  
granted the Writ of Certiorari.

1968

May 27 Decision of United States Supreme  
Court in *Puyallup Tribe v. Department of Game of Washington, et al.*,  
391 U.S. 392

RELEVANT DOCKET ENTRIES  
REMAND RECORD

1969

Aug. 7 Supplemental petition for order holding  
James Siddle and Robert Satiacum  
in contempt and/or alternatively, for  
an amended injunction . . . . . Re. 6

Sept. 17 Order dissolving amended injunction of  
June 2, 1967, and issuing temporary  
injunction restraining members of  
Puyallup Tribe from drift net or set  
net fishing in the Puyallup River and  
Commencement Bay in violation of  
conservation laws . . . . . Re. 9

1970

Sept. 17 Answer of Puyallup Indian Tribe to  
supplemental petition . . . . . Re. 10

Nov. 24 Trial court files its memorandum opin-  
ion dissolving the temporary injunc-  
tion of September 17, 1969 . . . . . Re. 12

Dec. 30 Trial court enters its Findings of Fact  
and Conclusions of Law and Decree . . . . . Re. 21

1971

Jan. 6 Respondent Department of Fisheries  
files its Notice of Appeal to the Su-  
preme Court of Washington . . . . . Re. 27

DATE	PROCEEDINGS	APPENDIX PAGE NOS.
Jan. 15	Petitioner Department of Game files its Notice of Appeal to the Supreme Court of the State of Washington . . . .	Re. 28
Jan. 22	The Federal Government files its Notice of Appeal to the Supreme Court of the State of Washington on behalf of the Puyallup Tribe of Indians . . . .	Re. 29
1972		
May 4	The Washington Supreme Court renders its opinion (copy printed in Petition for Certiorari. No. 72-481, Oct. Term, 1972).	
June 26	Remittitur issued by the clerk of the Washington Supreme Court making its judgment final as of June 23, 1972 . . . . .	Re. 30
Sept. 21	Petition for certiorari filed by the Washington Department of Game in No. 72-481	
Nov. 20	Petition for certiorari filed on behalf of Puyallup Indians by the Federal Government in No. 72-746	
1973		
Mar. 19	The United States Supreme Court grants the writs for certiorari in No. 72-481 and No. 72-746 and consolidates them	

**SUPPLEMENTAL PETITION FOR ORDER HOLDING  
JAMES SIDDLE AND ROBERT SATIACUM  
IN CONTEMPT AND/OR ALTERNATIVELY  
FOR AN AMENDED INJUNCTION**

**IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON IN AND FOR THE COUNTY OF  
PIERCE**

DEPARTMENT OF GAME of the STATE OF  
WASHINGTON and the DEPARTMENT OF  
FISHERIES of the STATE OF WASHINGTON,  
*Plaintiffs,*

v.

THE PUYALLUP TRIBE, INC., a Federal Or-  
ganization, et al.,

*Defendants.*

No. 158069

Come now the plaintiffs, the Department of Game of the State of Washington and the Department of Fisheries of the State of Washington, and for a first claim against defendants, state:

**I.**

After the entry of the judgment of the Supreme Court of the State of Washington in the above-entitled matter (70 Wn. 2d 245) that on June 2, 1967, an amended injunction was entered in accordance with the State Supreme Court opinion. A true and correct amended injunction is attached hereto and marked Exhibit No. 1.

**II.**

That on the 27th day of May 1968, the United States Supreme Court issued its opinion in the above-entitled case (391 U.S. 392). In the course of its opinion the court observed that the matter of establishing that the conservation laws and regulations sought to be applied to the fishing activities of the Puyallup Indians was a matter to be left to state court determination (391 U.S. 402-403).

**III.**

That subsequent to the entry of the amended injunction

as set forth in Paragraph I above and subsequent to the opinion entered by the United States Supreme Court, that James Siddle and Robert Satiacum claiming rights to fish in the Puyallup River as members of the Puyallup Tribe of Indians, did on or about the 5th day of August 1969, operate at the 11th Street Bridge in the Puyallup River in Pierce County, Washington, a set net capable of taking food fish from the Puyallup River contrary to the terms of the injunction heretofore entered by this court.

#### IV.

WHEREFORE plaintiffs pray that this court issue an order to James Siddle and Robert Satiacum to appear on the \_\_\_\_ day of \_\_\_\_\_, 1969, at the hour of \_\_\_\_\_ or as soon thereafter as the matter may be heard, in Presiding Department \_\_\_\_ of the Superior Court for Pierce County, Washington, in Tacoma, Washington, then and there to show cause, if any they have, why they should not be held in contempt for violation of the amended injunction heretofore entered by this court. This petition is based upon the affidavits attached hereto and upon the record in these proceedings.

#### V.

For a second and alternative claim against defendants, plaintiffs state:

#### VI.

That should this court determine that the amended injunction heretofore entered is no longer of full force and effect, that a restraining order immediately be issued restraining the above-named defendants and all members of the Puyallup Tribe of Indians from fishing in the Puyallup River or Commencement Bay with set nets or drift nets capable of taking food fish or game fish contrary to the laws and regulations of the State of Washington and further that the restraining order, after hearing, be made a temporary injunction prohibiting said conduct.

#### VII.

Further, plaintiffs pray that said temporary injunction, after hearing, be made permanent prohibiting said fishing activities. This petition is based upon the affidavits at-

tached hereto and upon the prior record of these proceedings.

### VIII.

Further, plaintiffs allege that the application of state laws prohibiting the use of set nets and gill nets in the Puyallup River and Commencement Bay is reasonable and necessary for conservation of food fish and game fish.

Respectfully submitted,

SLADE GORTON,

*Attorney General.*

JOSEPH L. CONIFF,

*Assistant Attorney General.*

of Counsel for Plaintiffs.

STATE OF WASHINGTON }  
County of Pierce } ss.

Joseph L. Coniff, being first duly sworn on oath, deposes and says, that he is the Assistant Attorney General for the plaintiffs above named, and makes this verification for and on behalf of said plaintiffs, being duly authorized to do so; that he has read the contents thereof and that the facts therein stated are true and correct.

JOSEPH L. CONIFF.

Subscribed and sworn to before me this 7th day of August 1969.

LAWANA PHILLIPS,

Notary Public in and for the State of Washington, residing at Olympia. My commission expires: March 3, 1973.



# **TEMPORARY INJUNCTION**

**IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON IN AND FOR THE COUNTY OF  
PIERCE.**

**DEPARTMENT OF GAME of the STATE OF  
WASHINGTON, and the DEPARTMENT OF  
FISHERIES of the STATE OF WASHINGTON,**

*Plaintiffs,*

No. 158069

**v.**

**THE PUYALLUP TRIBE, INC., a Federal Or-  
ganization, et al., . . . . .**

*Defendants.*

This matter having come on regularly, for hearing before this Court, upon the motion of the plaintiffs, for a temporary injunction, the plaintiffs being represented by Slade Gorton, Attorney General, and Joseph L. Coniff, Assistant Attorney General, the defendants Robert Saticum and James Siddle being represented by Arnold J. Barer and Malcolm McLeod, the defendant Silas Cross being represented by Jack Tanner, and the defendant The Puyallup Tribe, Inc. appearing by and through Frank Wright, but without counsel, the Court having considered the files and records herein and having heard the argument of counsel:

**NOW, THEREFORE, IT IS HEREBY ORDERED,  
ADJUDGED, AND DECREED that:**

1. The amended injunction heretofore entered by this Court on June 2, 1967 be, and the same is hereby, dissolved,

2. The question of the continued existence of the Puyallup Indian reservation is not relevant to any issue in this proceeding and is not properly before the Court,

3. All the individual defendants and all members of the Puyallup Tribe are hereby temporarily enjoined from drift net or set net fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the

rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington.

JOHN D. COCHRAN,  
Judge of the Superior Court:

Approved as to Form for Entry. Notice of Presentment Waived:

JACK E. TANNER,  
Attorney for Silas Cross.

FRANK WRIGHT,  
Pro se

Approved for entry as the decision of the court subject to defendants' exception. Notice of Presentation waived.

Wettrick, Toulouse, Lirhus & Hover, Malcolm McLeod,  
by ARNOLD BARER.

Presented by:  
JOSEPH L. CONIFF,  
Assistant Attorney General,  
Attorney for Plaintiffs.

### ANSWER OF PUYALLUP INDIAN TRIBE TO SUPPLEMENTAL PETITION

IN THE SUPERIOR COURT FOR THE STATE OF  
WASHINGTON IN AND FOR THE COUNTY OF  
PIERCE.

DEPARTMENT OF GAME of the STATE OF  
WASHINGTON and DEPARTMENT OF FISHERIES of the STATE OF WASHINGTON,  
*Plaintiffs,*

vs.

THE PUYALLUP TRIBE, INC., a Federal Organization, et al.,  
*Defendants.*

No. 158069

COMES NOW the Puyallup Indian Tribe, one of the defendants through its attorney, Stan Pitkin, United States

Attorney for the Western District of Washington, and Jerald E. Olson, Assistant United States Attorney (appearing pursuant to Title 25 United States Code, Section 175), and answers the Supplemental Petition of the plaintiffs for an amended injunction with respect to this defendant as follows:

I.

Said defendant is a tribe of American Indians recognized as such by the United States, is a party to the Treaty of Medicine Creek (10 Stat. 1132), and is not subject to the jurisdiction of this Court.

II.

Said defendant has fishing and hunting rights secured by the said Treaty of Medicine Creek within reservation boundaries and at all usual and accustomed places.

III.

Puyallup River and Commencement Bay are among the places to which the fishing rights of said defendant Tribe apply.

IV.

The laws and regulations of the State of Washington which prohibit or restrict use of set nets or drift nets capable of taking food fish or game fish in the Puyallup River and Commencement Bay have not been shown to be and are not reasonable and necessary for the conservation of such fish runs.

V.

Some or all of the waters mentioned in the Supplemental Petition are outside of the jurisdiction of the State of Washington with respect to regulation of fishing by Indians for the reason that said waters are "Indian country" within the meaning of 18 U.S.C., 1151 and are within reservation boundaries.

VI.

Issuance of an injunction as requested in the Supplemental Petition would be contrary to the rights of the defendant Tribe and its members secured by the said Treaty of Medicine Creek.

## VII.

Injunction is not a proper remedy for enforcement of violations of the fishing laws of the State of Washington.

**WHEREFORE** defendant Puyallup Indian Tribe prays:

1. It be dismissed as a party;
2. The temporary injunction be dissolved;
3. No injunction should be entered herein;
4. This action be dismissed;
5. For such other and further relief as deemed equitable in the premises.

**DATED** this 17th day of September, 1970.

STAN PITKIN,  
*United States Attorney.*

/s/ JERALD E. OLSON.  
*Assistant U. S. Attorney.*

1012 United States Courthouse, Seattle, Washington.  
98104. 583-4735.

### MEMORANDUM DECISION

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON IN AND FOR PIERCE COUNTY.

DEPARTMENT OF GAME of the STATE OF  
WASHINGTON, and the DEPARTMENT OF  
FISHERIES of the STATE OF WASHINGTON,  
*Plaintiffs,*

vs.

THE PUYALLUP TRIBE, INC., a Federal Or-  
ganization, et al.,  
*Defendants.*

No. 158069

This case has now been in litigation for several years. After its first trial, an appeal was taken to the Supreme Court of the State of Washington, 70 Wn. (2d) 245, 442 P. 2d 754 (1967). This court's decision was affirmed by the Supreme Court of the United States, 391 U. S. 392, 88 Sup. Ct. 1725, 20 L.Ed. 2d 689.

The purpose of the action is to obtain a declaratory

judgment defining the rights of the Puyallup Indians under the Treaty of Medicine Creek, signed in 1854, by which the Indians surrendered all the lands and country occupied by them, in return for which they received a reservation and certain rights. In Art. III of the Treaty appears the clause about which the dispute revolves, and which is as follows:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the territory."

The basic question is whether under this clause of the Treaty the Indians have any special rights over and above the rights enjoyed by all citizens to take fish. The trial court in this case concluded that the Puyallup Tribe no longer existed as an entity, that its members no longer had any rights under the Treaty, that there was no longer any Puyallup Indian Reservation, and hence the Puyallup Indians had no exclusive or special fishing rights within what had been the reservation.

The Washington Supreme Court held that the trial court had no jurisdiction to pass upon the question of whether there was a Puyallup Tribe in existence. However, the Supreme Court did agree there was no longer any Puyallup Indian Reservation for the reason that long ago the property in this reservation had been allotted to the Indians in individual ownerships and disposed of. In addition to a declaratory judgment, the Departments sought an injunction against the Tribe and its members to prevent them from violating any laws of the State of Washington, or any regulations of the Departments. Our Supreme Court, approving the issuance of an injunction, stated at page 248,

"A multiplicity of arrests for violation of fishing regulations, which involve the jailing and detention for considerable periods of individuals and consequent hardship to them and their families, seems to us the unnecessarily hard way of determining whether they have immunity from certain fishing regulations."

On the appeal, the Departments took the position that the Indians never had any rights other than those granted to all citizens of the territory; however, the court answered

this to the contrary, holding first that regardless of whether treaties with Indian tribes were necessary, they were deemed desirable by the United States and could not be repudiated by this state or its courts.

The defendants, on the other hand, had urged that they have rights under the Treaty to fish on the reservation, and at other usual and accustomed grounds and stations at any time and with any type of gear they choose, and that they did not have to comply with any regulations. The court refused to go along with either of these contentions, and stated its position on page 250:

"The members of the tribes signatory to the various treaties do have certain special fishing rights thereunder, notwithstanding the contention of the state. And the members of such tribes are subject at least to regulations which are necessary for the preservation of the fishery, notwithstanding their contentions to the contrary."

Because the reservation lands have been allotted and sold, pursuant to an Act of Congress removing all restrictions upon alienation, the Court held that the rights of the Indians to fish exclusively on the reservation, as it once was, no longer existed, but that their rights, if any, would have to depend upon the quoted section of the Treaty.

It was recognized that the State must have the necessary power through its Departments, to adopt appropriate regulations to preserve a resource for the benefit of all of the people of the state (page 261). This position, however, was amplified by the following statement:

" . . . The burden of proof, once the defendant has established that he is a member of a tribe having a treaty right to take fish at all 'usual and accustomed grounds and stations,' is on the state to show that its regulations, which limit Indian fishing rights either as to the time or manner of fishing, are reasonable and necessary to conserve the fishery." (p. 257)

In connection with this point the Court further said:

"The state has clearly met that test, at least to the extent that it has established that continued use by the

defendants of their drift nets and set nets would result in the nearly complete destruction of the anadromous fish runs in the Puyallup River and that a regulation prohibiting the use of such nets was necessary for the preservation of the fishery." (p. 261)

It was stated by the Court that the injunction entered by the trial court, enjoining the defendants from in any manner fishing in the Puyallup River and Commencement Bay, contrary to the rules and regulations of the Department of Fisheries and the Department of Game, was too broad, and that it was predicated on the trial court's determination that the defendants had no treaty rights. The Court then remanded the matter to the trial court with the following directions:

"The cause must be remanded to the trial court for the entry of a judgment and decree predicated upon the proposition that the defendants do have treaty rights, but that they are subject to conservation regulations which are reasonable and necessary to preserve the fishery.

"The essence of this opinion is—and the decree, as reframed, should so reflect: (1) If a defendant proves that he is a member of the Puyallup Tribe; and (2) He is fishing at one of the usual and accustomed fishing places of that tribe; (3) He cannot be restrained or enjoined from doing so, unless he is violating a statute, or regulation of the Departments promulgated thereunder, which has been established to be reasonable and necessary for the conservation of the fishery.

"The injunction should be tailored to the particular situation. A specific act or acts should be enjoined on the basis that there has been a violation of a statute or statutes, or a regulation or regulations promulgated thereunder, and that such regulation or regulations are reasonable and necessary for the preservation of the fishery. The findings, conclusions, and judgment in this case should be rewritten to show clearly the basis and the extent of the injunction."

After some discussion, the Supreme Court of the United

States affirmed the opinion of the Supreme Court of the State of Washington.

The Departments then filed a supplemental petition seeking to carry out the directions of the Washington Supreme Court. However, the matter becomes further complicated by the fact that the two departments are no longer taking the same position. The Department of Game, which has jurisdiction of the management and control of steelhead trout, is still adamant in its contention that the Indians have no special rights over and above those given to all citizens. The Department of Fisheries, on the other hand, has now conceded that the Indians do have some special rights. The Department of Fisheries, therefore, has set aside, by regulation, certain times when the Indians may fish in the Puyallup River with nets. This regulation provided that it would be lawful for enrolled members of the Puyallup Indian Tribe to take, fish for, and possess salmon taken for commercial purposes, with gillnet and set-net gear, in that portion of the Puyallup River lying between the City of Puyallup and the Eleventh Street Bridge in Tacoma during the period September 21st through October 23rd, 1970. This regulation is subject to the conditions that it would be unlawful to engage in this fishery during weekly closures from 6 p.m. Wednesday to 6 p.m. Sunday; that no set net could be used which extended more than one-third the width of the River, and that it would be unlawful to engage in this fishery with gillnet gear containing mesh larger than 6½ inches stretch measure.

A biologist from the Fisheries Department testified that during the year 1970 there had been an unusually large run of Coho salmon. The period designated by dates for this opening to net fishery was during the Coho run up the river after the Chinook run had almost ceased. Therefore, in the opinion of the Department, the opening of the river to Indian fishing was geared to permit fishing of Coho salmon almost exclusively. The Department further stated that if and when it became feasible to give the Indians special rights in regard to fishing Chinook salmon it would do so. However, that period, according to the Department's statements, had not yet arrived. In the opinion of its biologist, it was still necessary to prohibit net fishing of the Chinook salmon.



To place this case in a proper setting on remand, this court would like to state that in its opinion it clearly does not have the right to make regulations. This is an administrative function, and jurisdiction for making regulations is in the respective departments. The departments are given the right to make such regulations by the statutes of this state, and although the Indians have argued that they should have a right to some voice in the making of these regulations, the court is of the opinion that the departments have the exclusive power to make such regulations. That the Indians do have special rights is no longer an open question for this court to consider. The meaning of the clause in Sec. 3 of the Treaty of Medicine Creek has already been decided by the Supreme Court of this State and affirmed by the Supreme Court of the United States.

The only matters with which this court is concerned is whether these special rights have been given consideration by the various departments, and if so, whether the regulations, as adopted by the Departments, are reasonable and necessary.

First, the court would like to pass upon the regulation as propounded by the Department of Fisheries, the regulation which permits limited net fishing in the Puyallup River.

It must be pointed out that this regulation does not permit such fishing in Commencement Bay at the mouth of the River. The testimony of the Department indicates that the fish at the mouth of the River are milling around for a considerable length of time, which would enable almost all of them to be caught by netting in that location. Therefore, the netting was limited to a portion of the Puyallup River, with certain closures permitting a necessary escapement for the perpetuation of the species by natural increases. The Department expects that by careful management and by stocking with young hatchery salmon, it can continue to grant the Indians a regulated net fishery in the Puyallup River. It hopes that the runs of the Chinook salmon may be established to the point where a limited net fishing by the Indians may be authorized.

It seems to the court that conservation practices have already been approved by the Supreme Court as being

necessary. It is the opinion of this court that the regulation adopted by the Department of Fisheries is not unreasonable as far as the Indians are concerned. However, the granting of an injunction to the Department of Fisheries at this stage of the proceedings presents a different question. It must be kept in mind that the purpose of this action was a declaratory judgment in order to define the rights of the Indians. The issuing of an injunction was approved by the Supreme Court only for the reason that it was the best way to handle the matter during the determination of this question. Ordinarily, enforcement of the regulations would be by arrest and prosecution for a criminal violation of either the statutes or the regulations. Since the issuance of the new regulation by the Department of Fisheries, there has been no proof that the Indians have violated this regulation, nor is there any proof that it is necessary that they be enjoined from violating the regulation. The regulation was passed on September 12, 1970, just a few days before the hearing on this matter in court. Therefore, this court is of the opinion that no injunction should be issued; that the Department does have the right to make these regulations; that they are not unreasonable; that they are necessary for the conservation of the fish; and that the Department should enforce its regulations, if necessary, by criminal procedures and not by injunction. Further the Court is of the opinion that the objection of the defendants to an injunction, on the basis that this would deprive them of a jury trial, is well taken.

The disposition of this matter as to the Department of Game presents some very complicated problems. The testimony by the biologist from the Department of Game indicated that the Puyallup River normally would produce about 5,000 steelhead trout per year. By hatchery plants, the Department has increased this take to 12,000 to 18,000 fish a year. There is some indication that during the year 1969 the take of steelhead trout in the Puyallup River had decreased to less than 12,000.

The Supreme Court has already held in the prior trial that it was established that protection of the steelhead was necessary, and that because of unlimited Indian fishing in past years, the number of steelhead in the Puyallup had been markedly decreased.

Although the Game Department's testimony indicated that there are steelhead in the River at all times of the year, nevertheless it would appear that the majority of the fish are present during two seasons, the summer run and the winter run. The winter season for steelhead, as to licensed sports fishermen, commences about December 1st of each year. The court is of the opinion that the open period established by the Department of Fisheries for salmon, as stated in its recent regulation, does not materially interfere with the runs of steelhead in the Puyallup River. Therefore, this regulation is not particularly in conflict with any regulations the Department of Game may wish to establish, even though some few steelhead may be caught by net fishermen during this period.

The background of steelhead fishing in the State of Washington is quite different from that of salmon. By law steelhead are trout, rainbow trout that go back to the sea. Unlike the salmon, they do not always die after they have spawned in the rivers, but return to salt water and some may again return to the rivers to spawn.

The Department of Game is financed almost exclusively by license fees collected from sportsmen who fish and hunt. In other words, during the past the Department of Game has received very little money, if any, from any other source, and has received no support from the General Fund of the State. It is quite obvious, then, that there is a conflict between what the sportsmen consider their rights for having produced these steelhead and what the Indians consider their right to fish for them on the river. There is no measuring stick to calculate what proportion of the fish should be caught by the Indians. If the river normally produces 5,000 steelhead a year, but the take has been increased to 12,000 to 18,000, can it be said that the Indians are entitled to even all of the 5,000 fish normally produced by wild sources?

In view of the fact that it is not within the province of this court to make regulations, and the position of the Game Department clearly indicates that it has not taken into consideration the special rights of the Indians as decreed by the Supreme Court, it would appear that this court is not now in a position to grant an injunction to the Department

of Game. It would seem that the burden is upon the Department of Game to pass a regulation demonstrating that it has considered the rights of the Indians. In view of the large number of steelhead caught in the Puyallup River, it would seem that the Game Department is not in a position to say that the Indians can be entirely excluded from the exercise of any special rights. It is within the province of the Department to adopt a regulation setting forth such details as the time in which steelhead may be taken and by what means. It should compute how much escapement should be allowed so that a comprehensive regulation may be formulated protecting the special rights of the Indians while still adequately conserving this natural resource.

When the Treaty of Medicine Creek was signed, these problems were not anticipated, but the growth of population, the improvements in transportation, and similar changes, have vastly complicated the problem. Even when this case was started, conditions were not the same as they are now. Only a few years ago, the distance that salmon might be shipped was rather limited. Today it is being shipped out from this area by air freight, and the salmon are delivered within a few hours to their destination. Nets today are not the crude affairs they probably were at the time of the Treaty. Not only are they made of nylon, but are also made of a clear plastic material which makes them nearly invisible in the water.

It seems obvious that because the Puyallup Tribe is widely scattered, there is no doubt that this rich harvest of fish has benefited only a few of the tribe. However, the Supreme Court has again said that the trial court in its original handling of this problem had no jurisdiction to decide that the Puyallup Tribe no longer existed.

In conclusion, the Court will summarize in this manner:

- (1) The Indians do have some special rights granted by the Treaty of Medicine Creek;
- (2) The Department of Game and the Department of Fisheries have the exclusive right to make necessary and reasonable regulations for the conservation of the fish;
- (3) The burden of proving that an Indian is an enrolled member of the Puyallup Tribe is upon the Indian.

(4) The burden of proving that the regulations are reasonable and necessary is upon the Departments.

DATED at Tacoma, Washington, this 24th day of November, 1970.

BARTLETT RUMMEL,  
*Judge.*

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR PIERCE COUNTY.

DEPARTMENT OF GAME of the STATE OF  
WASHINGTON, and the DEPARTMENT OF  
FISHERIES of the STATE OF WASHINGTON,  
*Plaintiffs,*

vs.

THE PUYALLUP TRIBES, INC., a federal or-  
ganization, et al.,  
*Defendants.*

No. 158069

THIS MATTER having come on regularly for trial before the undersigned judge of the above-entitled court pursuant to a supplemental petition of plaintiffs seeking an amended injunction, and upon the remand of the Supreme Court of the State of Washington after prior proceedings in this court and that state supreme court's decision in 70 Wn.2d 245, 422 P.2d 754 (1967), and the U. S. Supreme Court's decision in 391 U.S. 392, 88 Sup.Ct. 1725, 20 L.Ed. 2d 689; and the plaintiffs having been represented by the Honorable Slade Gorton, attorney general of the State of Washington through Mr. Joseph L. Coniff, his assistant for the Department of Game, and Mr. William N. Gingery, his assistant for the Department of Fisheries; and the defendants being represented by the Honorable Stan Pitkin, U. S. Attorney for the Western District of Washington, through Mr. Jerald E. Olson, his assistant, appearing for the defendant Puyallup Tribe; Mr. Jack E. Tanner appearing for the defendant Silas Cross; Mr. Arnold J. Barer appearing for the defendants Satiacum and Siddle; and Mr.

John Sennhauser appearing for the defendant Ramona Bennett; and the court having reviewed the files and records herein insofar as material to the instant proceedings, and having heard extensive evidence, reviewed briefs and argument of counsel, and entered a memorandum decision herein, now enters the following:

## FINDINGS OF FACT

### I.

The Department of Fisheries has adopted a regulation admitted into evidence as exhibit No. 3 hereto, effective September 12, 1970, providing that it would be lawful for members of the Puyallup Tribe to take, fish for, and possess salmon taken for commercial purposes, with gillnet and set nets in that portion of the Puyallup River lying between the city of Puyallup and the 11th Street Bridge in Tacoma, during the period September 21 through October 23, 1970. This regulation is subject to the conditions that it would be unlawful to engage in this fishery during weekly closures from 6:00 p.m. Wednesday to 6:00 p.m. Sunday; that no set net could be used which extended more than one-third the width of the river, and that it would be unlawful to engage in this fishery with gillnet gear containing mesh larger than 6½ inches stretch measure.

### II.

The Department of Fisheries has determined that the Puyallup River system has a potential as a salmon producer considerably above present levels and is engaged in efforts to expand the runs in this river.

### III.

The Department of Fisheries has promulgated regulations recognizing special off-reservation treaty Indian fishing rights. In addition, it has declared as its policy the commitment of additional resources toward building up runs in the Puyallup River.

### IV.

For conservation reasons the Department of Fisheries limited the geographical scope of this fishery to that area of the river above the milling grounds at the mouth of the

river and in Commencement Bay, and yet below the spawning grounds of the Puyallup River and its tributaries. The Department also limited the time and manner of fishing to permit escapement of salmon to the spawning areas to insure perpetuation of the species.

V.

The Department of Fisheries extended the closure of the East Pass area to commercial fishing to protect the Fall 1970 run of spawning coho salmon to the Puyallup treaty Indian fishery. The Department did not place additional closures on fishing in Northern Puget Sound or the Strait of Juan de Fuca. Such additional closures could not be made specific to the Puyallup salmon in those areas because the stocks were still thoroughly mixed with feeding fish and the spawning salmon are destined for many other rivers and streams.

VI.

A biologist from the Fisheries Department testified in the proceeding before this court that during the year 1970 there is a large run of coho and the period designated in the regulation for this opening to Indian net fishery was geared to permit fishing only on this coho run.

VII.

The Department of Fisheries did not set a 1970 season for a chinook salmon net fishery in the Puyallup River because it felt that this run could not yet stand such a fishery.

VIII.

After a review of all the facts, the action by the Department of Fisheries in passing the regulation is not unreasonable as far as the Indians are concerned.

IX.

The Department of Fisheries has failed in its proof in showing a factual basis for the necessity of an injunction. There has been no proof that the Indians have violated the regulation referred to in Finding I hereof, nor is there any proof that it is necessary that Indians be enjoined from violating that regulation.

X.

With respect to the Department of Game, the evidence



shows that the Puyallup River normally would produce about 5,000 steelhead trout per year. By hatchery plants, the department has increased the annual take for licensed sport fishermen to 12,000 to 18,000 steelhead a year.

#### XI.

The Department of Game in regulating game fish resources has not taken into consideration the treaty rights of the Indians as decreed by the Supreme Court. The Department of Game has not adopted a regulation recognizing the treaty rights of the Indians and hence its law and regulations are not shown to be reasonable and necessary.

From these findings of fact, the court makes the following:

### CONCLUSIONS OF LAW

#### I.

Members of the Puyallup Tribe have fishing rights, secured by the Treaty of Medicine Creek.

#### II.

The Department of Game and the Department of Fisheries have the exclusive power to make necessary and reasonable regulations for the conservation of the fish.

#### III.

The burden of proof that an Indian is a member of the Puyallup Tribe is upon the Indian.

#### IV.

The burden of proof to establish that the regulations restricting treaty Indian off-reservation fishing are reasonable and necessary for the conservation of the fish resources is upon the departments.

#### V.

The Department of Fisheries has met the burden of proof that its regulation admitted into evidence herein is reasonable and necessary for the conservation of the fish resource.

#### VI.

The Department of Fisheries can show no irreparable injury, and is adequately protected by criminal sanctions.



The granting of an injunction would deprive the defendants of their right of jury trial with respect to any alleged violation of statute or regulation.

# VII.

The Department of Fisheries is not entitled to an injunction.

# VIII.

The Department of Game has failed to show that it is entitled to any injunctive relief for the same reasons as applied to the Department of Fisheries, and in addition because it has failed to give any consideration to Indian treaty fishing rights as decreed by the Supreme Court.

# IX.

Before the Department of Game may restrict members of the Puyallup Indian Tribe from fishing at off-reservation usual and accustomed fishing places of that Tribe, it must adopt regulations that conform to the requirements heretofore prescribed by the Supreme Court in this case.

# X.

The temporary injunction issued herein upon the supplemental petition of the plaintiffs should be dissolved.

DONE IN OPEN COURT this 30th day of December, 1970.

/s/ BARTLETT RUMMELL,  
Judge.

# DECREE

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR PIERCE COUNTY.

DEPARTMENT OF GAME of the STATE OF  
WASHINGTON, and the DEPARTMENT OF  
FISHERIES of the STATE OF WASHINGTON,

*Plaintiffs,*

vs.

THE PUYALLUP TRIBE, INC., a federal or-  
ganization, et al.,

*Defendants.*

No. 158069

**THIS MATTER** having come on regularly for trial before the undersigned judge of the above-entitled court pursuant to a supplemental petition of plaintiffs seeking an amended injunction, and upon the remand of the Supreme Court of the State of Washington after prior proceedings in this court and the state supreme court's decision in 70 Wn.2d 245, 422 P.2d 754 (1967), and the U. S. Supreme Court's decision in 391 U.S. 392, 88 Sup.Ct. 1725, 20 L.Ed.2d 689; and the plaintiffs having been represented by the Honorable Slade Gorton, attorney general of the state of Washington, through Mr. Joseph L. Coniff, his assistant for the Department of Game, and Mr. William N. Gingery, his assistant for the Department of Fisheries; and the defendants being represented by the Honorable Stan Pitkin, U. S. attorney for the Western District of Washington, through Mr. Jerald E. Olson, his assistant, appearing for the defendant Puyallup Tribe; Mr. Jack E. Tanner appearing for the defendant Silas Cross; Mr. Arnold J. Barer appearing for the defendants Satiacum and Siddle; Mr. Frank Wright appearing pro se; and Mrs. John Sennhauser appearing for the defendant Ramona Bennett; and the court having entered its findings of fact and conclusions of law, and being fully apprised in the premises; now does, therefore,

**ORDER, ADJUDGE, and DECREE** as follows:

1. The findings of fact and conclusions of law entered in this cause upon this date are incorporated herein by this reference as though fully set forth, and are declared to govern the rights, status, and other legal relationships between the parties hereto pursuant to RCW 7.24.010.

2. The temporary injunction heretofore entered by this court against the defendants is hereby dissolved.

**DONE IN OPEN COURT** this 30th day of December, 1970.

/s/ **BARTLETT RUMMELL,**  
*Judge.*

# **NOTICE OF APPEAL**

**IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON IN AND FOR THE  
COUNTY OF PIERCE**

**DEPARTMENT OF GAME of the STATE OF  
WASHINGTON, and the DEPARTMENT OF  
FISHERIES of the STATE OF WASHINGTON,**  
*Plaintiffs,*

**vs.**

**THE PUYALLUP TRIBE, INC., a federal or-  
ganization, et al.,**  
*Defendants.*

**No. 158069**

**NOTICE IS HEREBY GIVEN** that the plaintiff, Department of Fisheries of the State of Washington, does hereby appeal to the Supreme Court of the State of Washington, from each and every part of the Decree in the above-entitled cause, entered in the Superior Court for the County of Pierce, on the 30th day of December, 1970.

**DATED THIS 5th day of January, 1971.**

**WILLIAM M. GINGERY,**  
*Attorney for Department of Fisheries*

**SLADE GORTON,**  
*Attorney General*

**WILLIAM M. GINGERY,**  
5th Floor, Hwys.-Lic. Bldg.  
Olympia, Washington  
Telephone 753-2702

**NOTICE OF APPEAL**  
**IN THE SUPERIOR COURT OF THE STATE OF**  
**WASHINGTON IN AND FOR THE COUNTY**  
**OF PIERCE**

**DEPARTMENT OF GAME of the STATE OF**  
**WASHINGTON, and the DEPARTMENT OF**  
**FISHERIES of the STATE OF WASHINGTON,**  
*Plaintiffs,*

No. 158069

vs.

**THE PUYALLUP TRIBE, INC., a federal or-**  
**ganization, et al.,**  
*Defendants.*

**TO: Department of Fisheries of the State of Washington,**  
**Plaintiff**

**Mr. William N. Gingery, attorney for Plaintiff,**  
**Department of Fisheries**

**The Puyallup Tribe, Inc., Defendants**

**Mr. Jerald E. Olson, attorney for Defendant Puyallup**  
**Tribe**

**Mr. Jack E. Tanner, attorney for Defendant Silas**  
**Cross**

**Mr. Arnold J. Barer, attorney for Defendants Robert**  
**Satiacum and James Siddle**

**Mr. Frank Wright**

**Mr. John Sennhauser, attorney for Defendant**  
**Ramona Bennett**

**YOU and each of you are hereby notified that the plain-**  
**tiff, the Department of Game of the State of Washington,**  
**does hereby appeal to the Supreme Court of the State of**  
**Washington from each and every part of the Judgment and**  
**Decree made and entered herein by the above-entitled court**  
**on December 30, 1970, whereby and wherein the court**  
**incorporated the Findings of Fact and Conclusions of Law**  
**and declared them to govern the rights, status, and other**  
**legal relationships between the parties hereto pursuant to**

RCW 7.24.010 and dissolved the temporary injunction heretofore entered by the court against the defendants.

DATED this 13th day of January, 1971.

Respectfully submitted:

SLADE GORTON,  
*Attorney General*

J. L. CONIFF,  
*Assistant Attorney General*  
600 No. Capitol Way  
Olympia, WA 98501  
Telephone: AC 206 753-2498

**NOTICE OF APPEAL AND CROSS-APPEAL  
IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON IN AND FOR THE  
COUNTY OF PIERCE**

DEPARTMENT OF GAME of the STATE OF  
WASHINGTON, and the DEPARTMENT OF  
FISHERIES of the STATE OF WASHINGTON,  
*Plaintiffs,*

No. 158069

vs.

THE PUYALLUP TRIBE, INC., a federal or-  
ganization, et al.,  
*Defendants.*

TO: Department of Fisheries of the State of Washington,  
plaintiff;  
William N. Gingery, attorney for plaintiff, Depart-  
ment of Fisheries;  
Department of Game of the State of Washington,  
plaintiff;  
J. L. Coniff, attorney for the Department of Game of  
the State of Washington, plaintiff;  
Jack E. Tanner, attorney for Defendant Silas Cross;  
Arnold J. Barer, attorney for Defendants Robert  
Satiacum and James Siddle;  
Frank Wright;

John Sennhauser, attorney for Defendant Ramona Bennett;

YOU AND EACH OF YOU are hereby notified that the defendant, THE PUYALLUP TRIBE, does hereby appeal to the Supreme Court of the State of Washington from each and every part of the Judgment and Decree made and entered herein by the above-entitled court on December 30, 1970, including the issue of whether there is jurisdiction over this defendant.

DATED this 21st day of January, 1971.

Respectfully submitted,

JERALD E. OLSON,  
Attorney for Defendant  
PUYALLUP TRIBE  
1012 United States Courthouse  
Seattle, Washington 98104  
(206) 583-4735

### REMITTITUR

### IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DEPARTMENT OF GAME of the STATE OF  
WASHINGTON,

*Respondent and Cross-Appellant,*  
DEPARTMENT OF FISHERIES of the STATE  
OF WASHINGTON, *Appellant,*

v.

THE PUYALLUP TRIBE, INC., a federal organization, et al.,

*Respondents and Cross-Appellants.*

No. 41822  
Pierce County  
No. 158069

The State of Washington to: The Superior Court of the  
State of Washington in and for Pierce County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on May 4, 1972, became the final judgment of this court in the above entitled case

on June 23, 1972. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

No cost bill having been filed, costs are deemed waived.

The petitions for rehearing were denied by order dated June 23, 1972.

cc: Honorable Slade Gorton  
 Mr. William M. Gingery  
 Mr. J. L. Coniff  
 Mr. Arnold J. Barer  
 Mr. John Sennhauser  
 Mr. Jerald E. Olson

IN TESTIMONY WHEREOF, I have hereunto  
 set my hand and affixed the seal of said  
 Court at Olympia, this 26th day of June,  
 A. D. 1972.

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**WILLIAM M. LOWRY**

*Clerk of the Supreme Court, State of Washington.*

**CLIFFORD J. MILLENBACH'S TESTIMONY**  
**(Re. 30-84)**

**CLIFFORD J. MILLENBACH** Called as a witness in  
 behalf of the plaintiff  
 Department of Game  
 after being duly sworn  
 by the court testified as  
 follows:

**DIRECT EXAMINATION**

by Mr. Coniff

30)Q Would you state your name and address, please?

A My name is Clifford J. Millenbach. I reside at 2532  
 Meridian Road, Olympia, Washington.

THE COURT: Will you spell your last name please.

A M-i-l-l-e-n-b-a-c-h.

Q Mr. Millenbach by whom are you employed?

A I am employed by the State of Washington Department of Game.

Q In what capacity?

A I am Chief of the Fisheries Management Division, responsible for all of the fisheries management program, Chief of Fisheries Management Division.

Q How long have you been with the Department?

A I started work for the Department of Game November, 1940, and have worked with them continuously since, with the exception of four years spent in the Air Force.

Q Could you briefly outline for the court your educational background?

A I graduated from the University of Washington in 1940 with a Bachelor of Science degree in Fisheries, worked six months for the Fisheries and Wildlife Service before being employed by the Department of Game. My first assignment was the Department of Game Fish, Hatchery Assistant. Within a year following that I was placed in charge of the hatchery program and I was responsible for the total hatchery state-wide program, until 1956, at which time I was moved up to Assistant Director and Assistant Chief of the Fisheries Management Division. In this position my responsibility was broadened to include all activities of the fisheries program, and particularly relating to recommendations on the sports fishing regulations. In 1965, I was promoted to the position of Chief of the Fisheries Management Division, which I have held since.

(Re. 31)

Q Are you a member of any professional societies?

A Yes. I am a member of the American Fisheries Society, which I have served a number of positions on committees in providing information for national meetings and I am a member of the Pacific Fishery Biologists.

Q Mr. Millenbach, what are game fish?

A Game fish are classified by state law, and include generally trout, species found in fresh water, particularly



the Centrarchidae species, which includes bass and sun fish, and others.

Q Is the steelhead trout, is that a game fish?

A Yes.

Q Are there steelhead in the Puyallup River?

A Yes.

Q What is the steelhead?

A A steelhead is a rainbow trout which goes to the ocean, and therefore is known as an anadromous species, and quite similar, of course, to the salmon.

Q Now, does the Department of Game in your area of responsibility have any programs having to do with the propagation of steelhead?

a. 32)

A The Department has a very extensive program involving steelhead trout. In total facilities it involves some eight hatcheries in western Washington, and some six what we term natural rearing ponds. The annual expenditures and a total state-wide steelhead program is some \$800,000, nearly all of this being derived from the sale of licenses. On the Puyallup itself, the Department has constructed, operates, and maintains the Puyallup hatchery. This particular hatchery has an estimated value of some two million dollars and annually produces 100,000 steelhead smolts, which are down stream migrant steelhead for planting in the Puyallup River.

THE COURT: How many did you say were produced?

A 100,000, which are released into the Puyallup River. This represents an annual expenditure of nearly \$16,000 for the Puyallup River.

Q Now, does the Department have any program to protect steelhead?

A The Department has, through its regulations for game fishing, developed a comprehensive protection for steelhead, and aimed at providing the largest catch possible, the largest runs possible. The regulations relate to the biology of steelhead. I believe it would be pertinent to the court that I briefly touch on the biology of steelhead, so it shows the reasoning and how and why the regulations were developed. Now, the steelhead trout are

(Re. 33)

started as eggs in the streams of western Washington, also in eastern Washington, it has been one of our surprises of fishery biology to note the extremely low survival of steelhead. Our studies and records indicate that approximately one-half of one percent of steelhead trout eggs deposited in suitable gravel survives to become adult, to return to the stream in which it was first deposited. The young steelhead emerge from the gravel in the late spring months and for the most part will spend two years growing up to what we term the smolt size. The young steelhead at approximately two years of age, in the spring of the year, of six to nine inches, undergo what we term a physiological change which enables them to adapt to the marine environment. These young steelhead have specifically moved out during the spring months of April and May, down to the marine environment, where they spend an additional two or more years before returning as adults to the river. Now, the point that I make here is extremely important, is the fact that these young steelhead do grow to a size of six to nine inches before they move to the marine environment. The normal minimum size limit in game department regulations is six inches. This was one of the first values received from early research work the department did, that we determined that if we were to protect these young steelhead and give them an opportunity to survive and be caught as an adult, we must design our regulations to provide this protection. These young steelhead have been protected and moved to the ocean, and apparently range far and wide in the North Pacific. There has been substantial information obtained on this pattern and it is noted that they extend as far west as the outer Aleutians and the entire Aleutian chain in the Gulf of Alaska before returning to the parent streams in the winter time for the winter steelhead. And of course we also have the races of summer steelhead which return during the summer time and thus are classified as summer steelhead.

(Re. 34)

- Q Along this line, how many months out of the year are adult steelhead present in the Puyallup River?
- A Judging from our catch record data received from the fishermen who fish for steelhead, we have noted that

there is substantial catch of steelhead in the summer months as well as during the winter time, and that adult steelhead are present in the Puyallup system during all months of the year.

**Q** Going back to one of the earlier statements I believe you made, Mr. Millenbach, regarding the cost and funding of the Department, could you briefly advise the court as to how the Department of Game is funded?

**A** Nearly all of the revenues available to the Department are derived from the sale of fishing and hunting licenses. This is placed into the game fund which is available only to the Department of Game. Our annual expenditures are approved by the legislature, and we utilize these funds. We do receive in some programs, some additional federal funds to support various activities of the Department. In the case of our anadromous fish there has been recently federal legislation known as the Anadromous Fish Act which has provided some funds to the Department and provided an opportunity to enhance our steelhead program in that direction.

**THE COURT:** Do you have any idea of how much that is?

**A** Yes, we have been getting approximately \$200,000 a year for construction, and approximately \$50,000 a year for operation of the facilities, to construct—the reason I hesitated, Your Honor, I used the total figures in the program. Actually only half are federal. Half are Department of Game funds. Rather than \$200,000, it would be a hundred of federal funds, rather than fifty, it would be twenty-five of federal funds out of the total.

**THE COURT:** Did you say half goes to the fisheries? I did not understand what you said.

**A** No, half is derived from the Federal Government, and half from our Game fund. For these anadromous fish projects, if we had a \$100,000 project, the Department of Game would provide from its Game fund \$50,000 and \$50,000 would be available from the federal program.

**Q** Now, would it be a fair statement, Mr. Millenbach,

that the Game department is a trust fund agency as opposed to a general fund agency?

A Yes, the Department of Game funds cannot be used by any other agencies.

Q And you survive, so to speak, on your own revenue, I take it?

A That is right.

Q In other words, can you give us some idea of the proportion of total income that the Department obtains from the sale of hunting and fishing licenses?

A The proportion of total income is a little over eighty per cent is derived from the sale of licenses.

(Re. 36) Q Twenty percent, then, coming from the federal or other sources?

A A mitigation from projects affecting our wildlife in the United States.

Q Such as federal power projects, hydro-electric developments?

A Yes.

Q Now you have discussed these various programs. Could you tell us if, relating to steelhead, can you tell us if these programs actually have benefited the steelhead fishery in the State?

A As I mentioned, the Puyallup Hatchery is specifically planting 100,000 steelhead smolts annually in the Puyallup River, and that has provided—

THE COURT: That is smolts you said?

A Yes, this is a downstream migrant steelhead or salmon. And we have observed on the Puyallup River, in a particular season which we made the effort to determine what the percentage of hatchery fish were, we found 61% of the catch in 1962-63 season were of definite hatchery origin, so the contribution to the fishery is a substantial one. The total state-wide program now involves the release of some 5,000,000 smolts and I would estimate, based on my working with the numerous tagging experiments we have had, and numerous real checks, that somewhat over 50% of all steelhead caught now is the result of the hatchery program.

**Q** The over 50% figure is true for the Puyallup River as well?

**A** As I mentioned, we have one study which showed that 61% in the Puyallup, a higher percentage in contribution.

**THE COURT:** You say 5,000,000 smolts. That is all over the State?

**A** This is state-wide, Your Honor, yes.

**THE COURT:** What percentage of those 5,000,000 go to the Puyallup?

**A** 100,000, sir.

**Q** Now, is there a way to, or let me put it this way, can you, as an expert or, are you aware of any methods for placing a value on a steelhead in terms of its catch in the sport fishery?

**A** The Department has been faced with this question for a number of years, particularly in relation to paying damages to the resource in hydro-electric projects, such as on the Cowlitz River, by the City of Tacoma, and so a year ago, two years ago, 1968, the Department contracted with consulting services in Seattle to develop information on the expenditures by fishermen and hunters in the State. Their procedure was to, by interview, personal interview, obtain expenditure information of a sample cross-section of the state-wide poll. As a result of this survey, it was shown that the steelhead fisherman, the individual who fishes for steelhead spends on the average \$122 a year, and we also note from the survey and from the sale of punched cards which are required for steelhead fishing, that there are approximately 140,000 steelhead fishermen in the State. If we take this average annual expenditure of \$122 and multiply it by the number of steelhead fishermen known to fish each year, we arrive at approximately \$60 value for every steelhead taken. In the case of the Puyallup, this would perhaps make an interesting comparison, the average annual catch of steelhead in the last few years has been somewhat over 12,000 fish. And if this was figured on the value of \$60 a fish, when taken in the sports fishery, we arrive at, I believe, some \$870,000 of annual ex-

penditures involved in catching fish on the Puyallup River.

THE COURT: How many did you say were caught, you figured, a year?

- A I said somewhat over 12,000 annually. I believe for the last few years, I believe it was 12,400 if my memory serves me right, Your Honor.
- Q Can you compare the value of a steelhead if it were taken for commercial purposes as opposed to the recreational value you just testified to?
- A Now, if this is the same number of steelhead, a little over 12,000 were taken and sold commercially, it would average about seven pounds apiece and I have been advised that the fishermen have received, on occasion, 38¢ a pound for steelhead. This will give us a value, I believe, of about \$38,000, if my memory serves me right.
- Q By the way, it is unlawful to sell commercially, deal in steelhead in this State?
- A Steelhead are classified as a game fish, and may not be entered into commercial channels or sold commercially.
- Q Where did you get the commercial data, cross-data?
- A I obtained it from the Department of Fisheries. This was updated from the sale of steelhead on the Columbia River where they might be handled commercially.
- Q By Oregon fishermen, not Washington fishermen?
- (Re. 39) A Yes.
- Q Right. Do you have any sports catch records during the period of time that the Puyallup Indian net fishery was occurring on the Puyallup River?

THE COURT: I think it is about 12:00 o'clock. I wonder, before you start that subject, if we shouldn't have the noon recess. Ordinarily we recess until 1:30.

#### NOON RECESS

- Q Mr. Millenbach, I believe just before the lunch recess, that we were, you were discussing the fact that what might be called game fish regulations and how they



might affect the steelhead runs of the Puyallup River?

- A Yes, I might review how the regulations are established. The Game Commission has been given, from the legislature, to promulgate rules and regulations relating to the taking of game fish, and they specifically involve the time, the place, and manner, and it has been the responsibility of the Fisheries Management Division in the Department to consider the biological impact of these regulations and to recommend to the Commission annually what the regulations should be. In the case of the Puyallup River, we are specifically concerned with steelhead, and anadromous fish, and have developed our regulations to take into consideration the biology of the fish. Specifically, this involves the fact that young steelhead, as I mentioned previously, reach a normal catchable size before going to the ocean, and that if we are to have adults we must protect them at this time. So the current season, as set on the Puyallup River, now involves a closure from the first of April until the first of July, and this provides, essentially, total protection to the juvenile fish so that they might go to the ocean and grow to larger size. In addition to this, there is built into the regulations, the necessity, of course, for conservation, and that specifically means that there be an adequate escapement of adult fish to seed the stream, and to assure that we have maximum production of steelhead in the stream. The regulations as now in effect, provide upstream deadlines, deadlines on the Puyallup River, and its tributaries, and, in addition to that, some of the tributaries are completely closed during the steelhead fishery so that an escapement of spawning fish is assured. In addition to that, and this, primarily because the populations and races of steelhead are extremely complex and this requiring an escapement through all segments of this race of fish, the sports fish or the game fish regulations limit the taking of steelhead to two fish per day, and thirty per season. We also have in our regulations a possession limit of four fish. In other words, an individual can fish two successive days and take two fish each day, and have four fish in his possession, but this limit on the individual take also assures an escapement while the fishing season is in progress, so we have a

safeguard then to make sure we have adequate spawning escapement and full utilization of the natural escapement and natural environment to raise steelhead. We have upstream deadlines, we have the closures in the tributary streams during the steelhead season, and the daily limit of two fish.

(Re. 41)

THE COURT: What do you say the season limit was?

A It is thirty in any one calendar year, a steelhead fisherman may not take more than thirty steelhead. In addition to these limits, of course, we also have the limit of the gear itself which, for the sports fish regulations are hook and line, and this, in itself, permits and allows an escapement of fish while the fishery is in process. It is very important to note that the regulations are designed to make sure there is a maximum utilization of the stream itself to produce fish and that we have full escapement, and in consideration of conservation I should mention too that we have been able to liberalize to some extent on these regulations in view of the supplemental programs that the Department has which I have already made reference to, and that is the planting of smolts in the Puyallup River. These have provided an opportunity to allow a greater sports harvest and this is reflected in the length of the winter time steelhead season, which runs from the first of December through March.

Q One additional point, for clarification, Mr. Millenbach, I believe this morning you testified with regard to some figures on the relative value of the steelhead in the Puyallup system for commercial as opposed to recreational value. Were those figures related solely to the Puyallup production, steel head production?

A They were related solely to the Puyallup and related to a recent survey which developed the value of \$60 per steelhead. Now, I pointed out that related to the year of 1968, at that time there was a catch of some 14,000 steelhead in the Puyallup River, and we consider a value of \$60 as a sports caught fish, we get a total value for that season catch of \$870,000. We turn it around, say the 14,200 fish were all taken commercially and were put into commercial processing, it would have a value

(Re. 42)



of 38¢ a pound and I believe that it figures out at \$38,000 for that year's catch.

Q This is taking, then, a specific year of production on the Puyallup?

A Yes.

Q Now, generally, how has the Puyallup River been doing in terms of steelhead production in the past years?

A Well, we have records dating back to 1947, which was the first year in which a punch card was required, and this gave us the first data and information on the catch in the river. For 1947 and the three succeeding years, this period was prior to the application of a planting program, prior to the application of what we now term our steelhead management program. The average catch was approximately 4,000 fish for those four years. In the following years, which measures quite closely with the development of the net fishery in the early segments of this next period, which extends, then, to 1964, we had an average catch of about 14,000 fish until the net fishery had grown in size and its effect on the catch, and we dropped down to some 10,000 fish, average, a year. I would like to point out that at the height of the net fishery, the Puyallup River, which had contained a fishery of 18,000, I think, in 1954, we had a low catch of 4,100 fish. After the net fishery was suspended, the catch again bounced back to an average of some 12,000 fish a year.

Q Now, this, well, can you give us some idea as to the size of the natural run of steelhead in the Puyallup River as opposed to the hatchery or artificially produced fish?

A I think we are talking about the natural production. We would have to relate it to the data we had prior to the beginning of our planting on the river and prior to the implementation of our management program. Again, this management program was tied real close to a change in the fishing regulations which considered more closely the biology of the fish, and based on that early information and based on the fact that we did have 61% of the catch in 1962, even with hatchery fish, it would be my opinion that the natural production of the stream, without any help from artificial propagation,

was approximately 5,000 to 6,000 fish a year.

THE COURT: I couldn't catch what year was 61%.

A 61% of the catch in 1962 were of hatchery origin.

Q Do you have any information regarding the migration routes of Puyallup steelhead?

A There are a number of areas in Puget Sound which have become established fishing spots for steelhead. They return generally along gravelly beaches. They return to both sides of Puget Sound. From that information and from information obtained during the processing of some of the, or prosecution, I should say, of some of the net fisheries in the Sound, it is quite evident the steelhead appear to travel close along the shorelines of Puget Sound, starting and entering the Sound from the Straits and on up to their ancestral streams.

(Re. 44)

Q With regard to Commencement Bay, do you have any information regarding the migration routes of steelhead in Commencement Bay?

A Commencement Bay sighting along one side of Puget Sound, my opinion in regard, because of these other observations, I would feel fishing depended on Chambers Creek, Nisqually, Deschutes, would cut across this area. This is of particular importance to the Department of Game by reason of the fact that Chambers Creek, which lies south of Tacoma, is the key stream in our steelhead propagation program. This stream, due to its temperatures and other physical aspects, has provided the opportunity to develop this hatchery program to where it was successful. And we rely on the run of steelhead to Chambers Creek for our winter steelhead program in western Washington. This involves the taking of three to four million eggs a year. Chambers Creek is closed to the taking of steelhead.

Q If I understand your testimony correctly then, Mr. Milenbach, if there were a net fishery in Commencement Bay, it would take some Chambers Creek fish, for example?

A This I believe.

Q Likewise, Deschutes River?

A Deschutes and Nisqually and there are other small populations which come down through the lower Puget Sound.

Q In other words, south Sound fish might well migrate through this area?

A Yes.

Q Now, Mr. Millenbach, in your opinion, as a fishery biologist, is it reasonable and necessary to prohibit the use of set-nets and drift-nets in the Puyallup River and Commencement Bay, with regard to steelhead runs of the Puyallup?

MR. BARER: I object to that question, Your Honor. That is the ultimate question the court has to decide, as such it is an improper question to be asking at this time. He can tell the factors, but ultimately the test which is set for the court in light of the Puyallup decision is the reasonableness and necessity of the limited regulations which apply, being an ultimate question he is not competent to testify.

THE COURT: Can't he testify to the ultimate question when it is a matter of expert testimony or opinion?

MR. CONIFF: I believe that he properly can. I believe that is what the appellate decisions say about it.

MR. BARER: He may only state the criterion.

THE COURT: I think he can give his opinion.

A In my opinion, the use of nets to take steelhead in the Puyallup River is contrary to conservation. And my reason for saying that, is that the regulations permitting the taking of steelhead specifically, taking into account that they in no way bar one group or another, they are available to all, and are aimed at providing the maximum catch consistent with the maximum production of steelhead. I think that my testimony has shown that by applying the regulations as we now have them established, by applying the benefits of artificial propagation, that we have greatly increased the runs of steelhead in the Puyallup River. And because of the very complex

nature of this run of fish, and because it is absolutely essential that escapement occur throughout the entire period that the steelhead run, for maximum production in the river, it is my opinion that nets are not consistent with conservation.

Q If I may have one moment.

THE COURT: You said set-nets. Did you say other nets too?

A I did not, Your Honor, distinguish between set-nets and drift-nets.

Q My final question, Mr. Millenbach, do you know of any discrimination that occurs against Indians on the basis of scheme or management scheme of regulation you have described in your testimony?

A There is none whatsoever, to my knowledge.

MR. CONIFF: No further questions.

### CROSS-EXAMINATION

by Mr. Tanner

Q Mr. Millenbach, you said, there was no discrimination against Indian fishing, is that correct?

A Yes.

Q A personal opinion?

A This is under the regulations as established by the Game Commission.

Q Who does catch those steelhead then?

A Citizens of the State of Washington.

(Re. 47) Q I beg your pardon?

A Citizens of the State of Washington.

Q Licensed by your Department?

A and non-licensed.

Q And how many license holders are there?

A There are approximately half a million license holders.

Q How many are Indians?

A Indians are not required to have a license to fish.

Q All right. Do you know, do your figures show, the total number of steelhead, that is what we are talking about,

taken by the Indians since you have been in the Department?

A I do not have that information at hand. I do have a record of the catch that was secured in the Puyallup, insofar as we were able to get that information.

Q Where do we first start fishing steelhead?

A First start fishing steelhead?

Q After it's gone from where you placed the eggs, down the river to the sea, wherever it migrates, when do we start fishing them within your jurisdiction?

A Within the waters of the State of Washington.

Q How far does that extend out?

A Three miles off the coast, I would assume.

Q Who starts fishing there?

A They are not taken except in the streams, with some minor exceptions, by sports fishing gear. There is a minor fishery in salt water by sports fishing gear.

Q What do you call minor?

48) A They are taken incidentally, for example, I was at the mouth of the Columbia this year, I talked to one skipper, he said he caught five steelhead on our gear this summer. The main fishery does not occur until the fish concentrate in the river.

Q Is there any fishing from the Straits of Juan de Fuca on down into all the various sounds, into Commencement Bay?

A There are places on Whidby Island they do quite well with sport gear. It has helped them determine the travel routes.

Q How many are caught there?

A I can't recall from memory, but I would guess on the Lagoon Point, for one, on Whidby Island, and Bush Point on another, they probably take two to three hundred steelhead a year in that area, with sports gear.

Q What is the difference between a steelhead and a king?

A Steelhead is trout, and king salmon is a salmon.

Q Is there some other difference? Isn't this some artificial designation by your Department?

A No, sir. One is a trout and the other is a salmon, scientifically speaking.

Q What is the difference, that is an anadromous fish?

A They're both anadromous. They have very similar behavior patterns, but they are two distinct species of fish.

Q After they go down the river, from the river and return and spawn, what happens to the steelhead?

A Some steelhead survive to spawn a second time. The number is extremely small.

Q In your Department records, do you have records where they survive to spawn again a second time?

A Yes.

Q You do?

A Yes.

(Re. 49) Q Have you those records with you?

A No. The, I know from the studies in which we have attempted to determine, the number that spawn a second time, for example, on the Green River where a detailed analysis of the population was made, through the same studies, it was determined approximately 5% of that population had spawned previously. In other words they were returning to spawn a second time.

Q This is the basic difference between that and the king salmon?

A It is one difference, yes.

Q What would be another?

A The other is that steelhead is a trout and king salmon is a salmon. This is the difference between the species.

Q Why? They are both anadromous, spawn in fresh water, go to salt water and come back?

A Yes.

Q Who do you work for?

A For the Department of Game, State of Washington.

Q And how is the Department of Game, who runs the Department of Game?

A The Department of Game is administered by the State Game Commission, appointed by the Governor of this State, and through the administrative staff, the director, who is appointed by the Commission.

Q By the Commission?

A Yes.

- Q Are the commissioner members appointed or selected by sports fishermen in the State, in any way?
- A Sports Council of the State, which is a leading council of the organized sportsmen of the State, recommended to the Governor and he has in the past frequently recognized their recommendations.
- Q How many members belong to it?
- A There are six.
- Q The sports fishermen, how many people do they represent in this State?
- A As I mentioned, we have half-a-million licensed fishermen and there are some quarter-of-a-million more who fish, including juveniles and—
- Q Basically, you, sir, represent 500,000 sports fishermen?
- A I include more than that. We represent the juveniles, too. The free license holders. There are some 450,000 now. We represent between seven and eight hundred thousand people.
- Q There are no Indians you represent?
- A They can be represented on equal footing.
- Q I'm asking you, there are no Indians among the 700,000?
- A I have not included them. They enjoy the same rights as the 700,000.
- Q In that seven or eight hundred thousand people, are there any Indians?
- A There could be.
- Q Are there?
- A No, I don't know specifically if any have licenses. They are not required to.
- Q Didn't you say a minute ago, they don't need licenses?
- A I did, and repeat.
- Q It would be a reasonable assumption they do not belong to the 700,000 or the 800,000 people you are talking about?
- 51) A I don't know whether they are or not.

THE COURT: I think that is argumentative.

- Q All right, and is it reasonable to say that your Department, your regulations, are based upon the attitudes of sports fishermen?



A As a biologist in the Department of Game, and as my responsibility to consider the resource, and that it be available equally to all, I would say that our recommendations to the Commission have been on this basis, and the Commission, which sets the policy on which, the time, place, and manner of taking this resource is set.

Q Is this a strong lobbying group we are talking about?

A I would not consider it so.

Q I believe you said that the steelhead were present in the Puyallup at all times?

A Yes, I am talking of adult steelhead, in this reference.

Q I understand that. Now do your records, or have you knowledge, how many were caught last month?

A I would not have that information now. We have knowledge as to what was caught in this period a year ago, we have that dated back.

Q Now, how many would you think, of this, how many did you say, five million that you plant whenever the cycle comes, how many do you think come back?

A We get survival of approximately 10% under the best conditions and less under adverse conditions.

Q How many would get to the Puyallup?

A Well, in the Puyallup, we have been planting in recent years 100,000 fish. We could have, you would have 10% or 10,000 fish.

(Re. 52) Q Are you familiar with the original trying of this case?

A Yes.

Q Were the exhibits, Exhibit No. N—

A I would not recall it by that number.

Q I will show you, see if you can refresh your recollection.

A Yes.

Q That defendant's Exhibit N in the original hearing of this case, reflects say—

THE COURT: Did you say ten or N.

A N.

MR. TANNER: N, Your Honor.

Q That in 1962-63, Indians caught 1,126, all others 10,887?



A Yes, that would be right.

Q Can you explain the discrepancy in the amounts, ten times as many taken by others as Indians?

A Remember first, that the information we have on that sheet in regard to the Indian catch, was only that information that the State could obtain. It was not complete in the first instance, and the catch as we have shown it for the sports fishery is derived from the punched cards which we have proven to be a reliable information on the total catch.

Q Indians don't tell the truth, white people do?

A I did not say that.

Q That was the inference.

MR. CONIFF: I object to this continued—

Q In 1961, 1,846, sport fishing, caught 9,431, the same situation?

A Yes.

Q In the only year apparently, in 1961, 1960, 1961 the, the figure shows 2,300, as opposed to 4,144. Have you any explanation how it got so close?

A Well, I was not available to witness that fishery closely but I assume this was the period when the net fishery was being prosecuted at times, and I would have no further knowledge as to why that was so close.

Q Now, then it is your opinion, as an expert biologist, by the way, in your personal knowledge do any of the fish biologists disagree with you in the State?

A I have no knowledge that they do.

Q So you all agree?

A Well, on conservation principles, I think so, the basis for reaching a judgment in biology is related to the habits of the fish, and all the factors involved, and I think the biologists are in agreement.

Q Then you disagree with the Department of Fisheries?

A I do not get into the management of salmon, I am talking about steelhead.

Q Now, then, it is your opinion as an expert, that conservation depends upon the absolute prevention of taking the steelhead by net?

A Yes.

Q Any time, any place?

A Yes.

Q All right, no question about that?

A No, I know that some fish are taken by nets.

Q Where?

A They are taken incidentally in some of the commercial fisheries that are in prosecution. They are taken in nets in the Columbia River. We are well aware of this.

(Re. 54)Q Based upon your personal observation on the Columbia, what is the difference if they take on the Columbia by nets, as if they take them on the Puyallup by nets?

A On the Columbia River there is a commercial fishery for all species that move up the river. It is still a melting point of many many races of anadromous fish, and races which can be harvested in that area. In the case of the Puyallup, you are down to a single racial group, or in any river, therefore, in my judgment and opinion it is hazardous and not consistent with conservation to permit a net fishery.

Q The taking of any fish, so I understand you correctly then, your position is that the taking by the Indians at the Puyallup River, by nets, under no circumstances is reasonable?

A That is my position, considering it for conservation, yes.

Q Under no circumstances? It can't ever be reasonable in your opinion?

A Well I cannot divorce my thinking from conservation. Therefore—

Q One follows the other?

A Yes.

Q Is that right?

A Yes, I would say so.

MR. TANNER: I have no further questions.

### CROSS-EXAMINATION

by Mr. Olson

(Re. 55)Q Now, Mr. Millenbach, you have indicated that salmon and steelhead are both anadromous fish?

A Yes.

Q When did the, one is a game fish, one is a food fish, right?

A Yes.

Q In 1854, when the treaty was signed with the United States, was there any distinction then between fish and game fish?

MR. CONIFF: I object, your honor, the treaty speaks for itself.

MR. OLSON: I think he can answer that question.

THE COURT: I think you should probably ask him what he knows about that date. I don't believe he was around.

A I have no knowledge whatever.

Q When did the Department of Game come into existence?

A Created in 1933.

Q When was the steelhead classified as a game fish?

A First legislative action occurred in 1925.

Q That was by the legislature? The legislature declared steelhead was a game fish?

A Yes.

Q So, somewhere along about 1933, your Department started managing the steelhead?

A Just about.

Q Now, taking the Puyallup, well, you say you plant 5,000,000 smolts a year?

a. 56) A State-wide.

Q 100,000 in the Puyallup River?

A Yes.

Q All right, these 100,000 smolt, approximately 10,000 or 10% come back, is that correct?

A Yes.

Q When you say come back, what do you mean come back?

A Return to the Puyallup River, yes.

Q And are fished?

A Yes.

Q And you indicate that there is probably a natural run of five to six thousand?

A Yes.

Q So that would mean we have about 16,000 fish returning, coming up that river? Those are fished?

A Yes.

Q A fair portion of them are caught? Didn't you say some figures on that exhibit Mr. Tanner gave you, 17,000 in one year?

A Highest catch, 18,000. These are average figures referred to. There are periods of peak production that enter into this.

Q Now, on a normal run of 16,000 fish, how many are normally caught, 12 to 14,000?

A Yes, it is indicated in our records that sportsmen catch about, oh, about 60% of the run if we have an intensive fishery period, it varies from year to year.

Q On an average run of 16,000, how many are taken out, 12 to 14,000?

A Approximately that, yes, uh-huh.

(Re. 57) Q So your statement is around 2 or 3,000 fish?

A Mm-hm.

Q And those 12 to 14,000, at least in the last few years, have been taken almost entirely by sports fishermen?

A Yes, the records I have given were the records of sports fishermen.

Q Now, in the Puyallup River, where do you get the smolt or the eggs for that hatchery?

A Eggs are obtained from Chambers Creek.

Q So, each year when you put in 100,000 smolt, they are coming from Chambers Creek? They are not taken from the Puyallup?

A This is right.

Q So, this is, in essence, an artificial run?

A Yes, uh-huh.

Q And it is for the benefit of sports fishermen, is that correct?

A Benefit for all those—

Q Sports fishermen?

A For the citizens of the State, yes.

Q Now, these indicate that steelhead are in the Puyallup River the year around?

A Yes.

Q When is their primary run?

A Primary runs occur from late November through April. It tapers off, and the summer runs start peaking in July and August, and they taper off in the late fall months. You have peaks then, basically, then the winter months and late summer months.

Q This 16,000, approximately, a year, that is for the total year on the Puyallup River?

A Yes.

Q During this period of time, during this whole year, on the Puyallup River, there are a number of salmon runs on the river, different kinds of salmon?

A Yes.

Q Do you have any idea of the number of salmon?

A No I have not refreshed my memory on the salmon runs. I don't deal in those figures. I don't have these.

Q You don't have any ideas?

A I wouldn't say that, but I haven't—

Q Substantially in excess of the 16,000 steelhead?

A I am certain, in numbers, particularly in the years of the pink salmon runs, the numbers would be very much higher.

Q I got a little lost in these questions of value and cost. Did you testify as to how much it cost the State, or how much money is spent, on bringing one steelhead up that river?

A My reference was an economic survey conducted by a survey group in Seattle, which related to the expenditure by each fisherman, and this—

Q That is the \$122. If I am an average fisherman I will spend \$122 a year for equipment and—

A Transportation and everything associated with fishing for steelhead.

Q O.K. Now, you mentioned a \$60 figure. What is that?

A That was arrived at by multiplying the annual catch by

(Re. 59)

\$122. I'm sorry—I am in error there. The \$60 was arrived at by taking the total catch of steelhead each this given year of 1968, and multiplying out the \$122 by 140,000 fishermen, and this gives you the total catch of steelhead. Into that, gives you the \$60 figure.

Q If I am an average fisherman, it will cost me \$60 for each of the fish I catch?

A Yes.

Q How much does it cost the State, or how much does your Department figure the cost for each of the 10,000 fish coming up the river?

A Well, Used the figure of \$16,000 for the cost of 100,000 smolts. If we get \$160 apiece, if my arithmetic is right, for each, this comes back.

Q By the time you put it in and come back, it is \$160 for each one that came back?

A \$1.60. Each one that was caught.

Q You are writing off the other 90,000 that don't?

A Yes. I don't think that is particularly, right.

Q Let me get this straight. You collect money from the license fees, and from that money you plant smolt?

A Yes.

Q And they go in the river, out to the sound and come back, and people who have the licenses go out and spend \$122 apiece for catching a fish for sport?

A On the average, now, not \$122 per fish, the steelhead fisherman spends \$122 a year if he fishes steelhead.

Q And it cost him, according to your figures, \$60 a fish, as if he went to the meat market and paid \$60 for a fish?

A Yes.

Q And these fish are not for food, they are just for sport. People take them home and eat them, but the main point is the sport fishing?

(Re. 60)

A It is recreation and food, yes.

Q Your definition of conservation, then, as I gather it, is to get the maximum number of fish for the sports fisherman, is that correct, to take by hook and line, and allow necessary escapement so the next year the sport fishermen can take as many or more steelhead?



A You are making a distinction, sports fishermen, as though it is limiting. It would apply equally to all citizens who have the right to fish in the manner prescribed by the Game Department for fish.

Q Sports fishermen?

A All right, if you call them that.

Q You have indicated, I believe, under Mr. Tanner's questioning, that you don't believe any kind of net fishing could be done on a steelhead run?

A In my opinion, it is not commensurate with conservation of steelhead.

Q Any place on the Puyallup River?

A That is correct.

Q Does it make any difference what the size of the net is, in your opinion?

A I suppose a net could be devised which would not catch any steelhead. This would be different, yes.

Q What about a five-foot or ten-foot net fishing an hour a day? Would that destroy a steelhead run?

A That, in itself, would have the effect of one net five or ten feet long. I could not conclude otherwise.

Q What happens if there are 50 fishermen out there with 50 hooks and lines—strike that question. What is the distinction between salmon and steelhead that would make it proper to catch a salmon by a net but not a steelhead, from a conservation standpoint?

61) A Well, there is a great deal of difference between the two species, from that aspect, in that hook-and-line fishery is, as proven, it is incapable of catching the catchable or allowable catch of salmon. And, there are such numbers of salmon that they are still taken commercially. The numbers of steelhead are not adequate to support a commercial fishery, and the sports fishery at the same time.

MR. OLSON: I have no more questions, Your Honor.

### CROSS-EXAMINATION

By Mr. Barer:

Q Mr. Millenbach, you used the term escapement. Will

you tell me what escapement means to you, how you used it, in respect to the—

A Escapement means an adequate number of fish permitted to spawn and produce, so that the run can be maintained.

Q What is that number on the Puyallup?

A I can only talk in general terms. We do not have the control of the fishery to do otherwise, but in our management, and in view of our experience in managing, we like to have an escapement of between 25 and 50% of the run.

Q Are there regulations by the Department of Fisheries by which that has been set forth—excuse me, by the Department of Game, where that is set forth where I can find that?

A Generally within our framework of regulations that this is accomplished.

(Re. 62) Q That is not what I asked you. That was not responsive to my question. If I went to look in the regulations of the Department of Game, could I find that figure?

A No, you could not.

Q You state that you tried to manage these fishery resources so as to benefit all of the population, apparently, that are your constituency. Do you treat fishing rights separately, and divide this from any of the other rights of your sports fishermen?

A No, we do not.

Q I also am hung up on this idea, no net fishery can be allowed. What is the practical difference between catching a single fish with a hook, line, and sinker, and a single fish with a net. Is there any difference?

A There is no difference in a single fish.

Q Are there certain types of nets, which are used to catch the salmon, which pass the steelhead through?

A Yes.

Q And you are equally opposed to those nets as well?

A There are nets, we are talking about, I am opposed to any nets in the Puyallup River.

Q Even though these pass steelhead?



A I did not understand that part. I'm sorry.

Q So, you are not opposed to net fisheries which pass steelhead?

A If they caught no steelhead, there would be no problem.

Q Now, let us come back to those which catch steelhead. Now, I think Mr. Tanner showed you defendant's Exhibit N, or a copy thereof, and it ends at 1963 and 1964.

A Yes.

63)Q Now, can you tell us what, if you carried these figures out, what these figures would be on this column, and I am referring you to the column which indicates catch, Indian, sports, and total on defendant's Exhibit No. N, up to the latest available figures.

A The latest available figures on sports catch is 1969, and we have that information.

Q What are those figures?

A The catch in 1969, I have them in my pocket, on the Puyallup River, 10,274.

Q How many of those were caught by Indians, according to your figures?

A I have no records of any Indian catch.

Q Let us go back to the next available year for that, about 1968?

A Yes.

Q What would be the figures for that?

A Catch in the 1967-68 season or 1968, is 14,500.

Q 14,581. Was this the correct figure?

A 89, I have.

Q How many Indians caught a fish?

A We have no records of the Indian catch.

Q Now let's see, would the next year before that, 1966, 1967?

A Yes.

Q Is that in this?

A The catch I have is 13,462.

Q And, again, do you have any record of Indian caught fish during this year?

A No, the last year of any records we have was 1963.

(Re. 64)Q 1963? So we are still going backwards, I think there are—

A There was one year we haven't looked to yet, I believe, that we had a catch of 17,000 in 1966, 1964 was 6,300.

Q In each of these years, you do not have the record for Indian-caught fish? How much in 1964, 6,300?

A 1964, 14,465, '65 catch, 4,400.

Q My figure I have taken from your bulletin, 8,566.

A There may have been a preliminary figure, that is 1964?

Q That is 1964, 1965.

A That may have been a preliminary figure.

Q You don't know of the number I want?

A Remember, in 1964, we did not, we were in trial in 1965 so that would have been a preliminary figure.

Q O.K., again, you don't have any for 1964?

A We have no record.

Q No record of any Indian fishing? Now, what criteria, first of all you, is that the, you did not have the figure, correct, in my understanding, that I could not look anywhere and find that 25 to 50% escapement figure that you were talking about on direct, your optimum escapement, is that correct? I cannot find that if I looked in a regulation?

A No, there is no reference to that.

Q Now, what do you, what do you use to determine that percentage which you totaled?

A The percentage is based on a long period of association with steelhead catch in many rivers, and the application of the current regulation and the trend in catches in those rivers.

(Re. 65)Q But there is no way that could duplicate your figures?

A No, it is not specific to start with, sir.

Q O.K., now, what would this 25 to 50% escapement rate apply to? The application would not be to hatchery, talking in terms of hatchery?

A Applies basically to the runs of steelhead in a given stream.

Q That is irrespective of catch bred or naturally spawned?

A Yes.

Q What, is there any specific limitation as to your hatchery or spawning capabilities? Do you have a limitation of hatchery racks or spawning pools on the Puyallup River which would somehow relate to this escapement rate?

A No, we do not.

Q In fact, most of the things, as you say, are brought in from Chambers Creek, is that correct?

A Yes.

MR. BARER: No further questions, Thank you.

### CROSS-EXAMINATION

By Mr. Sennhauser:

Q Mr. Millenbach, you said the regulations are reasonable and necessary for the conservation of fish, is that correct?

A Yes.

Q Would you define what you mean by necessary?

A Necessary for conservation, to maintain the premise that our obligation, our responsibility is to have the highest population of steelhead that is possible.

Q Would you agree that your regulations, you are trying to make your regulations the least restrictive as possible in order to keep the runs of steelhead going? In other words, you don't want to make them any more restricted than you have to, to keep the fish runs in the river?

A I would agree with that, yes.

Q Would you agree that that conservation of fish mainly has to do with the propagation of fish, that would be a first definition of conservation?

A No, conservation is much broader than that, in our opinion, it involves the assurance that the race of fish will be perpetuated, that it will be there at its greatest height possible relating to the environment, and that the largest catch possible is arranged for, so it is a very broad concept we work in.

Q You are saying that conservation is more than the mere propagation and perpetuation of fish?

A Yes. It is the management of fish.

Q Are you saying if we set an arbitrary number as the escaping number to keep the fish there, that conservation is more than sustaining that minimum escaping number?

A The responsibilities of conservation, is, in my opinion, would go further than that in that it has to provide an equitable catch of the fish available.

Q Would you care to explain that, why is that, Mr. Millenbach?

A This is the concept of scientific management of a fishery, that conservation means the wisest use, that it be available, at its optimum production, to the greater number of people.

(Re. 67) Q You are disagreeing with federal courts who define conservation of fish as propagation of fish?

MR. CONIFF: I object. It is proper in closing.

THE COURT: It is a legal argument. He is not a lawyer.

Q Would you recall a trial in this building April 30, approximately, *State v. Cantrell*, where you were a witness?

A Yes.

Q And I was one of the attorneys who cross-examined you at that time, did I not?

A Yes.

Q What was your response to the question of the regulation in that case, or, more specifically, what was your response to questions regarding net fishery?

A My response to the question regarding net fishery, not consistent with conservation.

Q You are saying that, okay, let me rephrase that. Would it be correct to say that you stated that an unregulated Indian net fishery would destroy the runs?

MR. CONIFF: I would submit that counsel would permit the witness to refresh his memory with the record of the proceeding, if he intends

to cross-examine him on the basis of testimony given in a prior case.

MR. SENNHAUSER: This goes to credibility.

THE COURT: I assume it is the same as a deposition. You can say, my question is such and such, was your answer such and such. I think it is similar to a deposition.

Q Did you state at that trial, Mr. Millenbach, that a highly regulated net fishery would not wipe out the runs of the steelhead on the Puyallup River.

A I don't recall making such a statement.

Q If I told you that was on the record, would you deny it?

A I would stand corrected. My recollection at this moment, I don't recall making such a statement.

Q Let me ask you now, would a highly regulated net fishery wipe out runs of steelhead on the Puyallup?

A A highly regulated fishery, well, the effect of the total regulation would be to the extent of the fishery itself. When you talk of wiping out a run, this is an extremely difficult thing to do, to totally destroy a run of fish with a particular type of fishery, so I find it difficult to answer your question directly and completely, but the net fishery would not be consistent with the conservation issue as I have discussed here.

Q Well, Mr. Millenbach, if there were a regulated net fishery regulated by the Indians, for example, would it not be possible to have enough steelhead returning in order to continue the species?

A A controlled net fishery could provide for some escapement, I could not deny that, certainly.

Q So, you are saying, essentially, that a regulated net fishery would not wipe out the streams, but it would not bring the maximum number of fish back for the years to come?

A I think that conclusion is consistent with my statements, yes. The net fishery would have its effect, depending on the magnitude and the measure of its effect on the total population.

Q If we were looking for a maximum number possible, wouldn't we agree we could have a higher maximum

number by cutting the number of fish each sportsman is allowed to catch? Wouldn't that be in furtherance of the way you define conservation?

A No, not in my opinion. The catch, as now provided for, as defined by the records of catch on the Puyallup, provides for an equitable and a good catch of fish, which doesn't have to be curtailed further.

Q Now, aren't you defining conservation as what you term to be equitable numbers of fish?

A I am defining conservation as previously stated, that it means taking the highest catch possible consistent with the maintenance of the resource.

Q If we are trying to get the highest catch possible, why not cut back the number of fish each catches and the number of days he is allowed to be out there?

A How would that increase the catch?

Q There will be a much higher escapement and more fish would come back.

A There is no direct relationship to increasing the escapement automatically increasing runs of fish, no, there is a limit to the reproduction and rearing capacity of these streams. In other words, if you had no fishery at all, you would have a population of fish that leveled off at about 6,000 fish in the Puyallup if you had no artificial propagation. There would be no more, no less.

Q You are saying your regulations are perfect the way they are now?

(Re. 70) A That's a pretty hard conclusion to reach, not being capable of some improvement. To the best of our capability now, and the knowledge we have now, they are the best that can be promulgated, yes.

Q Let me ask you this: you said a net fishery would be absolutely impossible in terms of your definition of conservation. What if we cut down the number of fish a sportsman is allowed to catch, or the number of days, whatever, and we allowed a highly regulated, self-regulating Indian net fishery. Would that be possible to still reach the same number of fish being caught now?

A It would be possible, yes.

Q Why don't you do that?



A We do not have the authority to do it.

Q What do you mean, you don't have the authority to do it? You make the regulations.

A By the laws of the State of Washington, steelhead may not be taken with a net.

Q If you could, would you do it?

MR. CONIFF: I object, Your Honor. I think the witness has answered the question.

THE COURT: I think he has made himself clear.

MR. SENNHAUSER: One moment, Your Honor.

Q Mr. Millenbach, does it make any difference to conservation, whether 2,000 or 3,000, whatever, fish are caught by sportsmen or whether they are caught by Indians?

A Conservation alone, no.

Q It makes no difference?

A It would be possible to rebalance the numbers caught and still maintain conservation. There is a surplus of fish or harvestable part that can be cropped in a system of conservation.

MR. SENNHAUSER: No further questions.

MR. CONIFF: I have nothing on redirect examination. If counsel have concluded their cross-examination, the Department of Game rests.

MR. TANNER: Before we rest, Your Honor, I would like to ask a couple more questions, and I'm sure Mr. Coniff will object.

### RECROSS EXAMINATION

By Mr. Tanner:

Q Then, sir, we have no records starting, commencing about 1963, 1964, about Indian catching of steelhead, if any?

A The Department of Game has no record as such.

Q Then, we can assume all steelhead were caught up the river, past the traditional location of Indian nets?

A Well, our record relates to this area, yes, and the record

which we have used here, the catch was made in that area.

Q And that the figures we do have before 1962, 1963, were the fish that were caught by the sports fishermen, always behind the nets, up the river?

A There may have been some overlap, but I think generally this is true.

Q Generally, they caught them behind the so-called Indian fishery?

THE COURT: What do you mean by behind, upstream?

Q In other words, they had gone beyond the nets and were caught upstream, this is what we are talking about?

(Re. 72) A Yes.

Q Now, isn't the steelhead really programmed for conservation?

THE COURT: I can't understand what you said.

Q Are the steelhead actually programmed for conservation purposes?

A I'm not sure I get the point of your question, but I would say yes.

Q You say it's in the river twelve months out of the year?

A Yes.

Q Isn't a steelhead a cannibal?

A All fish are predacious.

Q Doesn't the steelhead destroy other salmon eggs?

A No, not in a deleterious way, no.

Q Is there another way?

A It consumes eggs on occasion, but they would be lost anyway. They are free floating, not deposited in gravel, therefore would not survive.

Q Won't the steelhead also go into the gravel for the eggs that are not free floating?

A No.

Q They are total cannibals, though?

A Sure, they're cannibals. If they get a chance to eat another fish, they will.

Q Isn't it true, that the steelhead probably destroys on



the Puyallup more salmon eggs than any other factor?

A I would have no foundation for such a conclusion whatever.

Q Possibly?

A No.

e. 73) Q Probably?

A No. There are other environmental factors which would have a much greater effect on the deposit of salmon eggs than other fish.

Q 140,000 steelhead fishermen?

A Yes.

Q Actually, you all belong to the Sports Fishermen's Association you talked about?

A No, they do not.

Q They have a license?

A Yes.

Q This is 700,000 people, approximately?

A Yes.

Q It costs \$122 a year for each fisherman?

A Those fishermen that engage in steelhead fishing on the average spend \$122 in the pursuit of steelhead.

Q In your experience, that group of people that spend that amount of money, where would they be on the economic scale?

MR. CONIFF: I object. We are beyond the scope of the proper cross-examination. The question of whether people are affluent who fish for steelhead or if they are not affluent gets into rather a remote area.

MR. TANNER: It has a direct relationship under equal protection of the laws, on discrimination against the Indians. They brought out the figure.

e. 74) THE COURT: Don't you think the people not working on the day they want to go fishing are the ones who go fishing.

MR. TANNER: I want to make an offer of proof to show that the normal or average expenditure of \$122 is some indication as to the economic

influence and affluence of those particular 700,000 people, as opposed to the poverty-stricken Indians. It is what we are talking about. How can we show, then, Your Honor, whether or not equal protection of the law is applied to the Indian, if we have this tremendous 700,000 people who, in effect make those regulations that apply to the Indians, because it is our position, Your Honor, under no circumstances do any of the regulations, any of the statutes that this gentleman, the witness, refers to, in any way apply to the Indians. All of them discriminate against the Indians, every single one of them.

THE COURT: Oh, I think that's going too far afield. I don't know how you are going to tell who has what money.

MR. TANNER: We know the Indians haven't got it, Your Honor.

THE COURT: I don't know that, either.

MR. TANNER: If what we are talking about is \$122 an average sportsman spends for equipment and travel, and so forth and so on, as he was referring to, we are talking about a certain part of an individual's budget. This is what we are talking about, and if we are talking about, and he says the Indians don't have to have a license, we can't be referring to them.

THE COURT: Well, I don't know, I cannot testify. I'm not inclined to testify or take judicial notice of anything.

MR. TANNER: That is what I am trying to bring out.

THE COURT: I think without some figures on the financial abilities of fishermen and—it's too far afield.

Q (MR. TANNER): How do you accumulate these figures?

A These figures were derived by making a population cross-section interview, personal interview, on the part of the consulting service and they could well have included Indians. I don't know if they did or not.

Q Do you have records?

A The consulting services would have the records on the households and individuals who were interviewed.

Q Where would those records be?

A With the consulting service in Seattle.

Q Were they under your direct command and control?

A They are a private agency that conducted the survey for the Department of Game.

Q You paid them for the consulting services?

A Yes.

Q Those records actually, then, belong to you?

A They are work records in their possession. We have only their conclusions and the final copy.

MR. TANNER: Your Honor, then I request the records be available, Your Honor, upon which he, as an expert, based his conclusions, the information as to \$122 per year by each fisherman.

MR. CONIFF: We will supply for the record a copy of the report, unless the witness has one with him.

THE WITNESS: I have a copy in my brief case.

MR. CONIFF: Does that include—

MR. TANNER: Does that include the work sheets.

MR. CONIFF: I doubt that.

MR. TANNER: His testimony was from the various households—

THE COURT: He says he does not have the work sheets. You can subpoena them, I suppose from the company.

MR. TANNER: I'm sure Mr. Coniff, acting in good faith, is going to supply them.

MR. CONIFF: I will not stipulate to the relevance unless you can show a basis for the belief the report itself by consulting services is in error.

MR. TANNER: There is a direct violation of equal protection of the law. If we can show, and I know we can, that this great number of people, 700,000 people, none of whom are Indians unless they are passing for some reason or other, comprise the people who actually control those par-

particular regulations and law as to fishing, now, if none of them, Your Honor, are Indians, I cannot see under any circumstances how the Indians can be then afforded equal protection if they don't participate in the group or body that actually influences the law as to the regulation of fishing, how can we say they are afforded equal protection of law.

(Re. 77)

THE COURT: I didn't understand that was the testimony. I understand the testimony was that the Indians did not have to pay a license fee and did not have to have a punch card.

MR. TANNER: That's correct.

THE COURT: Therefore, there was no record of the Indians' catches.

MR. TANNER: That's correct.

THE COURT: Whereas, anybody else than Indian had to pay a license fee. By the way what is the fishing license?

THE WITNESS: Fishing license fee at the present time is \$5.50 for a state license.

THE COURT: Is there a county license?

THE WITNESS: There is a county license of \$4.00, I think, Your Honor.

MR. TANNER: The offer of proof includes this, that all the regulations and rules, or whatever else controls Indian or any other fishing in this State, are set by the state legislature. They promulgate the rules and statutes and regulations, now, the people that influence those rules influence the legislation that the legislature passes, are this great 700,000-some people in this State, and I think we can reasonably assume it does not include Indians. There is no reason for the Indian to belong to them. The position of this Department is the position of this great number of people who, by his own testimony, Your Honor, do not consider the Treaty of Medicine Creek in the promulgation and enforcement of the rules. His own testimony is, it makes no difference who

you are, it has no effect upon his particular opinion as an expert witness. And all I am saying is that the Supreme Court of the United States says, and the Supreme Court of this State says, yes, the Indian Treaties of Medicine Creek do mean something and it means the Indians have a right to fish.

THE COURT: Apparently that is conceded already.

MR. TANNER: By this position, Your Honor, under no circumstances will net fishing be allowed.

THE COURT: That's true.

MR. TANNER: Our position is, this is a violation of equal protection of the law.

THE COURT: You are trying to have the court assume the Indians are financially not able to fish, therefore, are discriminated against.

MR. TANNER: Financially not able to afford \$122 a year.

THE COURT: It includes more than the license. It includes the amount of gasoline they spend chasing around from river to river.

MR. TANNER: Booze.

THE COURT: Booze, yes, after the fishing is over, I assume it includes all the tackle they think will catch fish, etc.

MR. TANNER: Just the very words, Your Honor, sport fishermen mean they are fishing for sport. The Indians are fishing for keeps. This is a means of livelihood, way of life. There is a tremendous difference if you are a sports fisherman fishing on a weekend and take a day off, than when you have to catch the fish. No steelhead fisherman is going to tell you you have to catch steelhead by line. You are not going to do it. The only way the Indian can possibly exercise their rights under the Treaty of Medicine Creek is by net fishery.

THE COURT: I think that's argumentative, and

(Re. 79)

will come later. I think it's all argumentative. The testimony in the case has already been that there are large, there is a large escapement when you fish with hook and line, because you just aren't as certain to catch them as with nets.

MR. TANNER: Will that also include, those are all sports fishermen who fish with hook and line?

THE COURT: You mean, they—

MR. TANNER: The only fish caught on that river is by hook and line by sports fishermen.

THE COURT: That I don't know. I suppose the only fish legally caught. I don't know if there is any poaching out that way or not.

### RECROSS-EXAMINATION CONTINUES

by Mr. Tanner:

Q Your testimony was, from 1964 there was no non-Indian fishing by net, is that right?

A No sir, I said we had no record of Indian catch.

Q Would it be a fair assumption you might not have a record of some that might—

A Yes.

Q One would balance the other off?

A I wouldn't say balance, but that is true.

Q But you must have informers, stool-pigeons, to tell you. The figures are pretty accurate, is that correct? Can we say, then, in all fairness, there is no appreciable catching of steelhead by Indians since 1964?

A Yes.

THE COURT: Since 1964?

A Yes sir.

Q Absolutely none, as far as you are concerned?

A We have no record of a catch.

(Re. 80)

MR. TANNER: No further questions.

MR. CONIFF: There is, I think it is probably clarified, but I want to make sure it is clarified, in the light of Mr. Tanner's line of questioning.



**REDIRECT EXAMINATION**

by Mr. Coniff:

- Q Is it true, Mr. Millenbach, that is leading, please state to the court the reasons why there are no Indian catch data on the Puyallup River, if you know.
- A The Indian catch data we do have was derived from the records that the Department of Fisheries, from fish tickets in the commercial trade. There is no commercial trafficking of steelhead from the Puyallup. Therefore, here are no fishing tickets. We have no information that any traffic did occur.
- Q So that the data you have would be minimal catch data, and there may be higher Indian catch unreported for these years?
- A That is the point I made.

**RECROSS EXAMINATION**

by Mr. Tanner:

- Q On the other hand, there might have been higher sports fishing catch than reported?
- A Mr. Tanner, the only point, we have run two other surveys to attempt to get at the validity of our summaries from the steelhead punch card. In one case we ran a questionnaire to 5% of licensees and projected a total catch, and this came out very close to the punch card summary. Another time there was again a consulting service conducted an interview, household survey, and again was quite close, so that we feel that surely there is some bias, but it is very nominal and we are reasonably close to the sports catch.
- Q The fish that came down from the, from the statements in the, from the open ocean and got tangled in someone's line and strangled, are those reported?
- A I would have no way of knowing.
- Q We are losing some along the way. Did you ever arrest anyone for failure to punch a card?
- A Not I, personally. The Department has.
- Q Many of these?
- A I don't know the volume.



**RECROSS EXAMINATION**

by Mr. Olson:

Q You indicated something about the number of fish the river could support, escapement. How many fish, steelhead, could the Puyallup River support on escapement?

A I said, based on my experience dealing with steelhead populations and in applying our artificial propagation program and results from it, and on the percentage of hatchery fish in the Puyallup catch, in the years we could distinguish, it was my opinion Puyallup production was between five and six-thousand steelhead a year, natural reproduction.

(Re. 82) Q In other words, if everybody quit fishing right now, you say, there would be, let us say ten years from now, it would be your opinion that the river would adjust itself and five to six thousand fish would come up?

A Yes, with no, the artificial propagation or plants were suspended.

Q So, in other words, the river could actually just handle five or six thousand?

A Well, it can produce that. It can handle more as far as physically accommodating larger runs, yes.

MR. OLSON: Nothing further.

**RECROSS EXAMINATION**

by Mr. Barer:

Q What is the difference between a catch and a run, practically?

A The catch is only part of the run.

Q Taking last year's figure, what percentage would you estimate would be the catch, and—

A I would guess that the sports catch at being approximately 60% of the total run.

Q In other words, 14,581 would be—

A Total run would be about 17,000.

Q Your figures, if this would be two-thirds, it would be closer to 20,000. At 14,000 fish, then, the 21,000 would be the run?

A Right, you are right.

Q So, is that your, so you say it is 6,000, so that the fish run now was over the ability the stream to—

A Yes, because of the artificial propagation in planting of steelhead.

83) Q Right now, as we stand here in 1970, the run on the Puyallup River is over its ability to stand the run?

A Well, the river itself is not producing the total run of steelhead.

Q With your propagation, with your propagation and with the natural run, you are above the ability of the Puyallup?

A To produce steelhead.

Q Produce and breed steelhead?

A Yes.

MR. BARER: Thank you.

MR. CONIFF: I have nothing further for this witness. As I said before, now that opposing counsel have completed cross-examination, the Department of Game rests.

THE COURT: I would like to ask a question.

### EXAMINATION BY COURT

Q You say there is an annual limit on a sportsman of 30?

A Yes.

Q Now, has that always been so?

A No.

Q That is since you began to regulate or propagate?

84) A No, when the punch card was first established in 1947-1948 season, it was 24. And, as our propagation program increased and grew in size, we extended the limit to 30 fish a year, but this also changed from a winter steelhead card to a year-around card, and it added fish, accommodated the taking of summer steelhead, which was not restricted or not recorded prior to 1960 or '61, in other words, I am saying that the original limit was 24, when the first punch card came out that related only to the winter season, in the early 1960's, and the annual punch card was established and the limit was set

at 30.

**Q** Did that result in a better sale of licenses or what? How would you—

**A** There was no big increase in sale. We had, through the early 1960's, we have had a steady increase in the sale of licenses of approximately 5% a year.

**Q** Since 1960?

**A** Yes.

**THE COURT:** I think I have no more questions. Any other questions? We will have the afternoon recess.

### **J. E. LASATER'S TESTIMONY (Re. 91-180)**

**J. E. LASATER:** Called as a witness of the plaintiff Department of Fisheries after being duly sworn by the court testified as follows:

### **DIRECT EXAMINATION**

**by Mr. Gingery:**

**(Re. 91) Q** Will you state your name and address, spelling your last name?

**A** J. E. Lasater. L-a-s-a-t-e-r. Route 8, Box 344G, Olympia, Washington.

**Q** Where are you employed Mr. Lasater, what is your title?

**A** I am employed by the Washington Department of Fisheries as Assistant Director of Operations.

**Q** Would you describe for us your educational background, please?

**A** I have a degree from the College of Fisheries, University of Washington, and about three quarters of graduate work at college.

**THE COURT:** Three quarters of—?

**A** Graduate work beyond the degree.

**THE COURT:** That is, you mean—?

**A** I took, I had the, I got my degree, my bachelor's degree,

then went to school for an additional three quarters, picking up other subjects.

Q Three quarters?

A Yes, three quarters of schooling.

THE COURT: You got a Bachelor of Science?

A Yes, in fisheries.

THE COURT: That is about another year's work?

92) A No, you can get it, your degree in fisheries in the four years.

THE COURT: You mean you did an additional year's work?

A Close to it. It was voluntary. Led to no further degree. I just did it.

Q (Mr. Gingery.) Would you describe for us your experience in the field of fishery biology?

A I first worked in fisheries as a part-time helper at a hatchery when I was in high school, in Montana. Then, during my college career I worked part-time for the Oregon Fish Commission and for the University of Washington, for the Department of Oceanography, summer work. After I left the college I went to work for the Department of Fisheries. It will be 20 years ago next May. My first work was in the pollution field assessing the effect of pulp mill pollutants, and subsequently other pollutants on salmon and their food organisms. From there I went to management of the sports fishery section, working with the sport fishery of the State of Washington. From that job, to that of senior biologist, working with all of the harvest food fish in the State, wherever they may be, and of all the species, exclusive of shell fish. From that post, over six years ago now, I don't remember exactly, took my present position.

Q Will you tell us, please, what species of salmon are found in the Puyallup River?

A The chinook salmon, often called king, coho, often called silver, pink salmon often called humpy, and chum salmon often called dog salmon.

93) Q What is an anadromous fish?

**A** An anadromous fish is one that is spawned in fresh water, spends a varying portion of its life there, and proceeds to sea, where it grows to mature size at sea, then must return back to fresh water to spawn.

**Q** Would you give us an example?

**A** Of course, the Pacific salmon is one example, chum salmon go to sea very soon after they can swim, silvers will stay in fresh water for a year, but they end up at sea. Shad are another. There are varieties of sea-going herring and that tribe, the sturgeon may be an anadromous. There is a number of them.

**Q** Would you explain for us the life history of a Pacific salmon?

**A** The Pacific salmon, at the, spawning time, digs its eggs into the gravel. They use that as a starting point, spawns in the gravel of a stream. They dig a hole in the gravel by fluctuations of the body against the gravel, this removes the fine material. They end up with a bed of clean rock of larger size, and the eggs are laid in the pocket in the gravel. They are fertilized upon extrusion. The male has been guarding the area, when the female lays the eggs, they are fertilized, drop into a pocket in the gravel. There is enough of an eddy so they stay there. The female moves just up stream and starts to dig a hole for the next clutch of eggs. The gravel dislodged from there goes downstream and covers those eggs. The pink salmon eggs may be four to six inches deep. Big, strong chinook, the eggs may be as much as 18 inches deep in the gravel. The adult salmon lingers near the nest for a time. Sometimes the males leave earlier, but the females stay there trying to dig gravel as long as she lives. There is also a terminal mortality. Body functions have been turning off ever since they left the sea. They are living on their own body. They don't feed. The stomach atrophies. There is no way of saving the fish. They die after spawning the eggs in the gravel. Fish are coldblooded, so their body rates proceed at a rate set by the temperature of their environment. We are at 98.6, and go at the same speed all the time, practically. They will hatch in 50 days, roughly, if the water temperature is 50 degrees. For every degree of colder, takes

(Re. 94)

five days longer. For 6 degrees warmer, they hatch five days sooner. As they hatch, they are still embryos; they are not complete fish, large yolk sac, quite helpless, no scales, can't feed, they stay in the gravel while they are being completed. They are absorbing the yolk sac for food and energy. After the yolk sac has absorbed, they change from being fearful of light, which keeps them in the gravel, they get attracted to seek their way out of the gravel, start feeding as small fish. Pink and chum go to sea very quickly at this point, traveling at night, and going back into the gravel, usually, during the day, or hiding. Chinook salmon, are the race that spawns in the fall or runs in the fall, which is the major race on the Puyallup, spend 90 to 120 days, usually, in fresh water, then go out their first summer. Spring chinook, which are a group that comes in the spring and goes to the head waters, behaves a little differently. They often stay in for another year. Coho invariably stay in fresh water a year. They proceed to the ocean. Then, with the chinook and coho, some will stay in Puget Sound during their feeding life, but the majority go to the ocean and they wander far there, by species and race, feeding from northern California to Alaska. They spend a varying amount of time at sea. The pink salmon always return as two-year olds, invariably, and have another peculiarity. They only run in Washington on the odd-numbered years, they are exactly two years old, and all of the succeeding generations, so we have a few odd strays from some Canadian waters on the even-numbered years, but no run. Coho spend two years in the sea almost invariably, so they come back as three-year-olds. The chinook will return as three-year-olds, four-year-olds, and five-year-olds, predominantly, and the sockeye as threes, fours—pardon me—chums, threes, fours, and fives. There is one other group I should mention, called jacks. They are precocious males, and are found in all but the pink salmon. There is a sex-linked characteristic that enables some of the faster-growing males to mature as two-year olds and come in there fully functional, but they are precocious. They return, heading on back home quite energetically, with only a very small amount of strain, they find their way back to



the particular estuaries they started from, into their home rivers, into their home tributaries, and, remarkably often, back to the same square yards of gravel they started from. Then the cycle starts over.

**Q** Mr. Lasater, would you define for us the term conservation?

**(Re. 96) A** Very simply, it is wise use. When we put it in terms of salmon harvest, I would put it in three categories or three parts, by harvest, in management of salmon as a crop, one, there must be a surplus and over and above the needed spawning escapement to have an available crop and not be taking the feed stock. Two, the manner of fishing, itself, must be such that you can control it so that you do not dip into the seed stock. As an illustration, if you had a pool and a small stream that contained most of the fish that were going to run to that small stream and you made one sweep through it with a beach seine, you would take not only the harvestable surplus but also the spawning stock. In this case, the manner of fishing would, of itself, take more than you wished. The other thing is that the manner of fishing, itself, must not be destructive. This should be rather obvious. If you dynamite the pool to get the fish, you cause a lot of damage to other things and you lose fish, or if you shoot them with a rifle, many escape and get away and die. That would be a destructive fishery in terms of a harvest, a crop. I would put it in three categories.

**Q** Would you state to us, please, the duties and responsibilities of the Washington State Department of Fisheries?

**A** Our responsibilities and duties are, of course, given to us by the legislature, State of Washington, and I would prefer to go directly to the code. It is stated there as well as I could state it, or better. This is the fisheries code, relating to food and shell fish, and I am reading from 75.08.020, General Duties of the Director—and I read the wrong section, pardon me. I will take that back. 75.08.012, Duties of the Department, it shall be the duty and purpose of the Department of Fisheries to preserve, to protect, perpetuate, and manage the food fish and the shell fish in the waters of the State and the offshore waters thereof, to the end that such food fish

**(Re. 97)**



and shell fish shall not be taken, possessed, sold or disposed of in such time or in such manner that will impair the supply thereof. Then I turn to a section that, which goes very well with that one, 75.08.080, Rules and Regulations, Scope. The director shall investigate the habits, supplies, and economic use of classification of food fish and shell fish in the waters of the State and the offshore waters and from time to time make, adopt, amend, and promulgate rules and regulations. Now I have only read part of that section. It goes into a number of items specifying shell fish, food fish, protection, sale, which detail that section.

Q Mr. Lasater, I asked you to prepare certain maps for use in explaining and illustrating your testimony. Do you have those here?

A Yes, they are beside you.

Q I would like to mark these, if I might, for identification, 1, 2, 3, 4.

MR. GINGERY: These are offered to explain and illustrate the witness's verbal testimony. They are official government charts. We have added place names and salmon migration flows; as you know, Your Honor, there are two forms of evidence, that which is introduced as original evidence and that which is entered as part of verbal testimony of the witness, to explain and illustrate. We enter these for the last reason, and move that they be introduced, plaintiffs 1, 2, 3, 4. This is before the court.

MR. BARER: I reserve any objection until I hear the purpose for which they are qualified.

THE COURT: And the court will admit them. I don't know about the last one. The ones that are on the official government chart, that would be the first four.

MR. GINGERY: First three, Your Honor.

THE COURT: What are the numbers?

THE CLERK: 1, 2, and 3.

THE COURT: They are not admitted as proof

of what they show, but rather for illustrative purposes.

**Q** (Mr. Gingery.) Mr. Lasater, I wonder if you would describe for us the commercial fisheries through which a Puyallup River salmon must pass to reach the Puyallup?

**A** Yes. There are fisheries in the ocean. I think I will mention the chart first, in case it is not clear.

**THE COURT:** Can everybody see now?

**A** This is the northwestern part of the State of Washington, the Strait of Juan de Fuca, Vancouver Island, the passage-ways up to Georgia Strait in Canada, and the entrance to Puget Sound is here, with Whidby Island lying here. Now, off the coast, along the entire coast from California to Alaska, there are commercial troll fisheries. These are hook-and-line fisheries, with vessels that are of varying capability, some just move out from port in the morning, back in the afternoon, others carry ice and stay at sea for a week to ten days, and they are fishing a multiple of lines, for salmon. There is a large Canadian fishery as well as the United States fishery. This fishery takes place both in state waters, which go out to three miles, and international waters on the high seas. The use of that fishery are a season which is agreed on between all the States and Canada, and beginning April 15 and ending October 31, and it has to be by agreement because of the high seas problems, we don't all agree, they can fish on the high seas and land in an open area, but we do have the agreement to protect the stocks during that time. It is a way of limiting the fishery. Because the other fishery, it takes place on the high seas, is a sport fishery, for personal use, for pleasure, with hook and line, net fisheries are not allowed on the high seas for salmon. The treaty between Canada and the United States, an agreement among the States, prohibits use of net fishing on the high seas, they are of a destructive nature on the milling, feeding stocks of salmon. As the fish move into the Strait of Juan de Fuca, a line across from Manila Point on the Vancouver side to Tatoosh on the Washington shore, net fisheries begin. I might mention that troll fishing is only slight here,

(Re. 99)

00) tapers off as it comes into the Strait, then hits a point in here, I don't remember exactly, just a ways inside the Strait, where troll fishing is prohibited. We now have the net fisheries, purse seiners operate here, now a purse seine simply is a net that surrounds the fish, set it with a boat, and the bottom of the net has a series of rings on it with a rope in it, you pull the rope and it purses the bottom of the net together. Once the purse line is on board and the rings are on board, the fish are trapped within the net, and you draw them aboard. The other fishery is a gill-net fishery that exists there. The net is set in the pattern of the fish, and the meshes are of such size the fish can get only part way through the net, are entangled in the net and can't get out, when you pick the net up later, you will have them. We have an Indian fishery at Neah Bay, there is a reservation here, the Makahs. They fish primarily gill-nets. They have done some purse seining in the past. I would not be certain they purse seine at the moment. We have special regulations set for that fishery, above and beyond the fishery for other people. Now, as the fish proceed through, this is a poor purse seine area, not fished much through here by purse seiners. It's mostly a gill-net fishery. Then from just this side of Neah Bay to near Port Angeles, three miles off shore, there is a salmon preserve where no commercial fishing is allowed, to, three miles offshore. Our general regulations on the net fisheries here are, one, partly to keep competing fishermen out of each other's hair, but in part for conservation. Purse seiners fish in the daytime, most suitable for their gear, and gill-netters fish at night. The length of the nets is regulated, nets over a certain length being prohibited, the days per week are regulated, depending on the size and strength of the fish run, how they show, what we have predicted the run to be. And then, there they fish by season. There is no fishery until the sockeye runs start in the early summer or mid-summer, depending on the race of sockeye, then the season closes always by the end of October, often earlier depending on circumstances.

01) Q Would you explain what the red line represents, and why it applies?

A Yes. The next thing to bring into this is the flow of fish through the fishery. The size of the red line represents the strength of the run, in this area, it is different year by year, but in general, of the fish entering the Strait of Juan de Fuca, this is all species of salmon, the greater bulk of them are going to Canadian waters, the Fraser River is probably the greatest salmon stream on the North American continent. These fish pass through American waters, and they fish on those under the treaty with the Canadians. In fact, much of the summer, the regulations in this area are set by the International Salmon Commission, set up under a treaty between the United States and Canada, and the Washington Department of Fisheries adopts their recommendations. The Director of the Fisheries is one member on that Commission. Near the entrance to Puget Sound we have, of course, well, you will see fine lines here of small runs of salmon peeling off and going to the small coastal streams and small streams, Strait of Juan de Fuca, fairly nice little line going to the Dungeness, a fine river. Some of the smaller streams have pretty solid runs of salmon coming down into Puget Sound. Another pretty solid run going through Deception Pass, largely headed for the Skagit River, another split-off, fish going to the Samish, this one is solidly supported by a hatchery, there is a hatchery at Dungeness, also run further down to Bellingham Bay, this one ending up at the Nooksack, and we have a hatchery up here on the Nooksack, small run going to northern streams.

Re. 102)

MR. GINGERY: We are now about ready to begin the description of the salmon run into Puget Sound. I notice it is 4:00 o'clock.

THE COURT: I think we will recess until tomorrow morning. This is our usual stopping point; we have been going since 8:00 o'clock this morning. Recess until 9:30 tomorrow morning.

Re. 103) **Proceedings of September 22, 1970, morning session.**

MR. ULVESTAD: Before you commence, I am Thor Ulvestad representing Ben Reed, one of the members of the Puyallup Tribe. I was in Seattle

yesterday and unable to appear. I represent Mr. Reed.

THE COURT: Now, I don't know, have you filed any pleadings?

MR. ULVESTAD: I have not filed any pleadings, no.

THE COURT: This trial has commenced. It has been pending a long time. It is a little difficult to allow people to come in here during the trial. We have already permitted Ramona Church Bennett and Maiselle Bridges to appear by their counsel, who are sitting at the table. The defendants did not object to it. They were permitted to come in. Are you representing this lady standing here?

MRS. REED: I asked you yesterday.

THE COURT: She did say you would be here today, but I think I'd better just, if it appears later you have something to offer, I will consider it, I think, at the present time you should not further complicate this matter. What is your name, sir, again?

MR. ULVESTAD: Ulvestad. First name, Thor.

THE COURT: You are representing whom?

MR. ULVESTAD: Mr. Benjamin Reed and Mrs. Reed.

THE COURT: That shows in the record.

## DIRECT EXAMINATION CONTINUED

by Mr. Gingery:

Q Mr. Lasater, you were describing the commercial fisheries of the ocean and the Strait of Juan de Fuca, through which the fish must pass to arrive at Puget Sound.

THE COURT: You will have to speak louder, so everyone can hear you.

A I had nearly finished with the runs of salmon, and the fisheries on them. They proceed through the Strait of Juan de Fuca, and the group branches off into Puget

Sound proper. One other main point I want to make, there is a line, approximately here, from, coming from across the Discovery Bay area to Whidby Island, so that Puget Sound proper can not be fished by purse seines until October 5 of the even-numbered years, when there are no pink salmon, then there is a short period on odd-numbered years, when the pinks run, when seines can fish, part way down the Sound, and there are a lot of fisheries on chinook and cohos.

THE COURT: I am afraid I didn't get the import of everything you said. There is seine fishing prohibited prior to October 5 in the—

A The confusion here is—

THE COURT: Let's say it a little simpler.

A All right, as I mentioned yesterday, pink salmon migrate only on the odd-numbered years.

THE COURT: I understand that.

(Re. 105) A So, on the even-numbered years, when there are no pink salmon, the seine vessels are not permitted to fish in Puget Sound proper until October 5. The significance of this is that the chinook run is all past in Puget Sound prior to the time the seines can operate. The early part of the coho run is already gone by before the seines can come into Puget Sound proper. So, one of the years is at least partially eliminated from the fishery. On even-numbered years, when pinks run, the seines have a short period they can come off Whidby Island, for a distance, and fish. This is one of the restrictions that—

THE COURT: The kings run in the even or odd-numbered years?

A Odd years, only in the odd years.

THE COURT: In the odd years, the boats are allowed to come farther south, to Whidby?

A Yes, for a brief period, but they cannot fish the full season inside Puget Sound on any year that the gill-netters can.

THE COURT: All right.

A This chart shows the reaches of Puget Sound, and added to it are, by my people, are the hatcheries and rearing systems that we have added to the chart, the migration



106) patterns of the salmon, and the hatcheries. As a group comes down into Puget Sound proper, all of the fish, virtually all the fish in Puget Sound are mixed here, then a group splits off, goes to Hood Canal, which has nothing to do with the stream of fish coming down to the Puyallup. As you go by the southern tip of Whidby Island, the Snohomish, Skagit, Stillaguamish fish peel off. We have a hatchery at the Skagit, one on the Skykomish feeding the Snohomish system. We still have quite a mixed group coming on down sound. This is the Lake Washington group. We have a hatchery here, on Issaquah Creek. This is the run going to the Green River, with a very important hatchery on the Green River system. As we approach Vashon Island, we have a splitting of the runs, one going down what we call West Pass and one going down what we call East Pass, and we have a tendency of the Puyallup fish to go down East Pass, especially the chinook, which will follow shorelines, and so this run will be predominantly the Puyallup fish, use predominantly this side, although some come down this side and turn the corner, I'm sure. At this point, we have roughly four groups. Chinook salmon, for instance, are still mingled together, but the number is diminishing, we still have fish bound for Minter Creek hatchery, Capitol Lake rearing area and the Nisqually River, but at this point we can start making more discriminatory—bad word—more precise management of the Puyallup fish. They are not as mixed, most of our regulations here are still on a greatly mixed stock, and are the type of regulations that protect the runs in general. When you get closer to the stream, you can start making regulations specific to that stream, so we have the usual season restrictions, gear restrictions, and limitations of the days of fishing, with two types of regulations, one, the regulations set early in the year, what we call a permanent regulation, and the other, a temporary regulation, where we adjust the fishery based on current knowledge, for instance, in this general area here, we had, if my memory is exactly right, four days set for chinook fishing this year.

Q Is this commercial fishing?

107) A Commercial fishing four days a week, the way the fishery



behaved, moving extra gear on to the fishery, and high catches, we decided it could not be fished four days a week, we cut it to three days. Sometimes you go the other way, the run is bigger than we expected, the fishing pressure down—

THE COURT: Where was this four days a week?

- A This was in this general fishery down through here. We had four days scheduled, and cut it to three because of the fishing pressure.

THE COURT: That was the north end, no, that was up at Point No Point?

- A From Point No Point down past Seattle, and generally down into, toward the northern end of Vashon Island. Actually, the regulation was in effect further, but nobody fished down here. The fishery was up here.
- Q (by Mr. Gingery.) Would you describe now, briefly, going back to the first map, and against this one, the sports fishery through which the Puyallup salmon pass?
- A Yes, the fishery is geared primarily—

THE COURT: Let's refer to those exhibit numbers.

- Q Exhibit No. 1.

- A The sport fishery is most effective on feeding fish. Feeding fish bite much better than the salmon after they have gone well into their migration and feeding slows down or stops. A fish that is through feeding for the rest of its life, will still bite on occasion, but they, it is a much slower rate than when they are actively feeding. So, the fishery, sport fishery takes, many, many more feeding fish than they do migrating fish. So, at this time, when the fish are feeding, they are thoroughly mixed, for instance, Columbia River salmon, when they are feeding, come all the way into the Port Angeles area. We have fish from many areas, a lot of Canadian fish here, thoroughly mixed, so you do not regulate specifically for any particular river. The total take is regulated by the general type of regulation, one line per man, three fish per day, and the knowledge that as the fish begin to migrate and their feeding slows down, they will be less and less vulnerable to the sport fishery. As they mature, the percentage of take drops way off on adult fish, and

for some reason, the males have a greater tendency to strike than the females, the proportion of males in the catch goes up, and since it is almost always the case that there is an abundance of males on the spawning ground, these fish are not missed, so you don't have as restrictive measures. Then, of course, on migrating fish, I think you can infer from what I have said, and I would state it, that the hook-and-line gear is nowhere near as efficient as net gear, so our main restrictive efforts to protect the migrating stock will be on the commercial fishery, to be specific, and general regulations on the sport fishery.

Q Moving now to another area, I wonder if you would describe, in general, fishery salmon management, fisheries management?

A Salmon management is the sum total of the activities required to both produce and protect salmon stock. I would break it into several parts, one, you must protect the natural run and the environment for that natural run, so that a large part of our effort in salmon management is in the environmental area, making sure, as best we can, that the natural spawning ground and rearing areas remain in good condition. Now, another part is, of course, management of the harvest itself, the fishery itself, then, of course, propagation, where you, through artificial means, enhance the salmon run, build it up.

Q Two questions. First, how important is the environment of the salmon you mentioned?

A Salmon are a cold water species that require a particular regime of flows and does well in clean water, and is hurt by pollution. The environment for salmon is easily upset, and it is a constant battle to keep clean gravel for them to spawn in, and the proper flows in the river diverted to power dams and irrigation.

Q Does the Department, through its own efforts, produce fish?

A Yes, we have 26 salmon hatcheries run entirely with State funds, or under State management, and there are 6 hatcheries on the Columbia River that the Department of Fisheries operates with federal funds and we have several—

THE COURT: That is in addition to the 26?

A In addition to the 26. The difference is in funding. Then we have several spawning channels in the Columbia River system. The production for all of these is right close to 80,000,000 pounds of young salmon.

Q Would you describe, both as an expert biologist and assistant director of the Department of Fisheries, whether or not, in your opinion, social and economic factors affect fisheries management?

(Re. 110)A Yes they do. A fishery biologist might prefer to use ideal scientific management, but the fishery is for people, and there is a framework of laws that we operate within, because people want their fishery handled for them in certain ways, and this framework of laws does change the ideal situation, where the fishery scientist might manage for that ultimate goal, which is the maximum sustained yield, but if people themselves want to fish in different manners, and restrict the scientific method according to human values, then this is done through laws.

Q What factors, short of law, affect management?

A Within the law, we often end up with several choices that we can make. They are all choices we can make perfectly legally, and we may alter a particular fishery because it does not make any real difference to the fishery resource whether we do it one way or the other, but it suits humankind better. An example is the Labor Day shift. We commonly start the fishery on Sunday night for gill-nets. They fish Monday. Through Sunday night into Monday morning on Labor Day, is the last big boating holiday of the year. We shift the commercial fishery oftentimes by one day so we do not have this interference. Another thing we do in starting our fishery early in the week, we avoid having a lot of fish on the fish-house floor Saturday and Sunday, because people take those two days off. The other thing that we will do, well, I mentioned, on the Labor Day shift, if it makes no particular difference to the fisheries, we will try to set fisheries in a way that removes conflict between competing fishermen, competing for the same fish and perhaps the same grounds.

111)Q Do you have a term that will draw all these factors together?

A Yes, we use the term rational fishery, what it means to us is that the fishery, one of our goals in the fishery is to have it, say, fit comfortably on the fisherman as much as we can, that they should understand it and be at ease with it, and that if we have a choice that does not affect, say, the overall catch or the fish themselves, and the fisherman will understand it better and be more comfortable with it, then we will try to do it in that way. This is also another, say, a corollary to this, is we tend to avoid regulations which would be more burdensome to the fisherman but which would make our job easier. We tend to examine the regulation and see if it will make, it is easier and more comfortable for the fishermen themselves rather than for the Department of Fisheries.

Q To return to the maps, Exhibits 1 and 2, you have already described in an earlier answer the migration pattern of the Puyallup River salmon, and the, some of the protective measures which affect them. With what precision is the migration of Puyallup River salmon managed?

A The closer we get to the ocean, that is the least precise area, with a vast mixing of fish, it is hard, you can't tell just exactly where Puyallup fish will be, and they are in a minority among other groups of fish. As they move down into the sound, your precision becomes better. As you can see, at about this point we can adopt what I would term a regional regulation, in that we can say that here is a group of fish going in this general area and we can start at this point to manage the stock here, and at this point, we can say well, here are two groups that are split off. If they are stronger than the general group coming down, then we can manage them somewhat differently at this point, to managing this group, which contains Puyallup, with more precision. After the Lake Washington stock and the Green River stock split off, then for chinook salmon, for instance, now we are dealing with four stocks, this line here is a salmon line, but it is mostly coho, where you are dealing with just four stocks, then you can begin to say there are enough

Puyallup fish here to start managing for Puyallup itself. And as an illustration of this, we have, we put in a closure of what we call East Pass, specifically to protect Puyallup stocks, and we were considering our greatest problem to be chinook salmon for escapement, but we continued that closure of lower East Pass for sometime this fall, week by week, as we judged what we might have in the way of Indian fishery, how they might fish, and what might be taken, and our last consideration was that we would hold that closure for the rest of the season because we have to provide coho salmon for both the Indian fishery and for escapement. Then, finally, we have a salmon preserve encompassing Commencement Bay, where no commercial net fishing for salmon is allowed at all, because the stocks, as they come down, we have been fishing migrating stocks that move, when they come down to Commencement Bay they stop and mill.

Q Let's move to Exhibit 3, discuss milling problems then, I'd like to go back.

(Re. 113) A All right. As the salmon bound for the Puyallup come into Commencement Bay, they stop for a time, and this is common of salmon stocks and especially chinook, and they mill about the bay for a time before they go into the river, and other stocks do this also. The problem here with the regulation, if you are going to fish the bay, is that your closures are not effective, or minimally effective, where fish are migrating, if you close a period of time, fish pass through the fishery. Where they are milling and you fish several days, then closed for several days, when you reopen the fishery the same fish are still there, and you lose your precision in management. You have not allowed an escapement, you put a fishery on top of a fishery. Since you don't know precisely how many are there and can't look at the fish escaping as yet, you don't know what you are doing to the stock there. We have some closures at the mouths of nearly every stream. This is a very common regulation picture.

Q Returning to Exhibit No. 2, did you state that the East Pass closure was continued indefinitely, with specific reference to the Indian fishery on the Puyallup River?

A Yes, our scientific staff recommended to the director

that in view of the Indian fishery, that we should keep the East Pass area closed because we had the task of providing for both an Indian fishery and escapement.

MR. GINGERY: I would like marked for identification the affidavit of the Director of the Department of Fisheries, to which is attached the emergency regulation which closed indefinitely East Pass with regard to which the witness just testified.

(Plaintiff Department of Fisheries' Exhibit No. 5 marked for identification.)

THE COURT: You say you closed these passes to commercial fishermen?

A Yes. Is it proper at this time to say we closed a portion of East Pass, we didn't close the entire East Pass, the southern portion.

MR. GINGERY: I move the introduction of this.

MR. BARER: I object, Your Honor, it does not meet the minimum requirements.

THE COURT: I don't know what it is. Will you have the witness identify it?

Q I'm ahead of myself. Would you identify that?

A This is an emergency regulation, Department of Fisheries.

THE COURT: What number is it?

THE CLERK: 5.

A It covers several things that we did in the same regulation, but the part here is labeled one-two-one-parenthesis-two-two-zero-dash-four-seven-dash-zero-four-zero, and lot two-two-zero-dash-four-seven-zero-six-zero, as last amended and superseded in part by the following emergency regulation and it reads, shall be unlawful—

MR. BARER: Your Honor, I object.

THE COURT: You have to offer it first. The court will admit it. It is admitted, because I take it it is certified.

(Plaintiff Department of Fisheries' Exhibit No. 5 for identification was admitted in evidence.)

**MR. BARER:** It is not certified, Your Honor, that was my objection. It is not under the seal of the Department of Fisheries. It is just on an affidavit. If Mr. Gingery is going to bring it, he should do it correctly. If it were certified, I would not object to it.

**MR. GINGERY:** RCW 75.08.100, Rules and Regulations of the Director, when accompanied by an affidavit from the Director or Assistant Director certifying that the rule or regulation has been lawfully adopted, promulgated, and published, the affidavit shall be *prima facie* evidence of the proper adoption, *et cetera*, of the rule or regulation. An affidavit, Your Honor.

**THE COURT:** The affidavit is attached.

**MR. BARER:** Yes, Your Honor, but it has to be under the seal.

**THE COURT:** All right, you can go into it now. Do you want him to go into it?

**MR. GINGERY:** No, Your Honor, this was—

**THE COURT:** He was starting to read it. I don't know whether you want to continue that or not.

**Q** (by Mr. Gingery.) Do you want to finish what you were doing?

**A** The regulation of importance here reads, it shall be unlawful to take, to fish for, and possess the salmon taken by purse seine and gill-net gear, in that portion of Puget Sound, salmon fishing area # 6, lying between lines projected from Point Robinson Light to Des Moines Light, that is the line here, and from Browns here, Browns Point Light to Pinter Point on Maury Island, down in here, from 9:00 a.m. September 18 until further notice.

**THE COURT:** I don't understand. Let me read that myself. Is that a northern and southern boundary?

**A** And the waters in between are closed, and it encompasses the southern part of East Pass.

**THE COURT:** All right, I understand it. I guess you are through with it.

(Re. 115)

(Re. 116)



**Q** I'm through with it, yes, sir. Mr. Lasater, are you familiar with the Puyallup River system?

**A** Yes, I am. I have been on the river many times, both of my own accord and on business. I have studied the reports of the Department of Fisheries having to do with the Puyallup River system and have conferred at length with staff whose business it is to work with salmon on the Puyallup River system.

**MR. GINGERY:** We have one exhibit already marked for identification, Your Honor, Exhibit No. 4.

**Q** Was this exhibit prepared under your direction?

**A** Yes, it was.

**Q** And does it represent the Puyallup River system?

**A** Yes.

**Q** And could you describe what the markings are on that map?

**A** They are markings basically, the map shows the various tributaries of the Puyallup River. We have added markings to show the area used by spawning salmon of the several species, and the two races of chinook salmon in the Puyallup system. It also has markings that show things that have been put there by the hand of man which affect the Puyallup system, such as dams, diversions, the hatchery, and so forth.

**MR. GINGERY:** Your Honor, that map is being offered as were Exhibits 1, 2 and 3, just to explain and illustrate the witness's verbal testimony, not as original evidence, but just so the court may clearly understand the testimony that will follow with regard to the Puyallup River system.

**THE COURT:** The court will admit it, No. 4. (Plaintiff Department of Fisheries' Exhibit No. 4 for identification was admitted in evidence.)

**Q** Using that chart, Mr. Lasater, would you describe salmon production in the Puyallup River?

**A** Yes, the salmon, after they leave Commencement Bay, migrate upstream to their various spawning grounds, and splitting off by species and by racial groupings, de-

pending on their origin, to various spawning areas in the system. One of the first forks is the White River, and the colored portions are keyed here with spawning, chinook spawning ground, fall chinook spawning ground in orange, coho spawning in blue, pink, in green, chum salmon spawning ground in red. There is, you can see, a little blue here, that is a small creek that comes in between Puyallup and the mouth of the river, coho only, then beginning at the town—

Q Coho only means coho spawning?

A For spawning. The other species of salmon don't enter the system in any numbers whatsoever, a few strays, this is always the case, then spawning in general for all species, but coho in the main stem, starts at Puyallup, the coho don't spawn in the main river below because they tend to like smaller streams, the Carbon River, the White River branches off northward, and all species spawn in it, virtually from the mouth. Here there is a change in the river, and I think I will jump upstream. There is a power house here, the water is diverted up by Buckley, the town of Buckley, goes down a flume to Lake Tapps, then down to the power house.

(Re 118)

THE COURT: Is that Dieringer?

A I think so.

THE COURT: I was just trying to locate it.

A I think so. But at any rate, the flow to the White River is often markedly reduced, above here, the water, instead of coming down the river has short-cut and gone to the power house, so the river is well used up here, but its production here is diminished because there isn't the water in it that would be if the power house wasn't here, but they all use it. Then, at Buckley there is a diversion dam, and all of the fish are trapped here and hauled upstream, because of Mud Mountain Dam and Reservoir here, and due to the physical characteristics of the area up there, we have not put in a fish ladder. The fish are hauled in tank trucks from the diversion dam upstream, at this point, we only end up with the spring chinook and the coho. The other fish don't come beyond here, so there is a gap in the river which is partly unsuitable, but which probably would be used by some

119) species if it weren't for Mud Mountain, a flood control dam run by the Army Corps of Engineers. The spring chinook and coho utilize the upper waters, the main river drains Mount Rainier, as do all of the main tributaries of the Puyallup system. They are glacial streams and are often colored, flow is colored, milky. Up the main Puyallup, all species using the main Puyallup, at this point right here, there is a split in the river, and we have the Carbon River coming off the Puyallup and going on. Also in the same general area, Voit's Creek branches off. This is where we have the hatchery on the Puyallup system for salmon, all three except chinook use Voit's Creek for a short distance, in fact, they do not go further up, have nothing to do with the hatchery. There is an impassable falls up a few miles. We considered putting a ladder up, but a few miles up is another set of falls. It never has been used by salmon very far up. This fork is South Prairie Creek, the only important salmon stream in the system that is not glacial. It is an excellent producer, and we place great importance on it, all species except spring chinook use it. This is the Carbon, only the lower reaches of the Carbon are used by all, virtually all species. The upper reaches are used by spring chinook and by coho, you will find that generally the rule, that the furthest migrations are going to be by spring chinook and coho. This is the Puyallup here, with spawning by a multitude of species. The thickening here is the addition of Ohop Creek. It drains Kapowsin Lake.

THE COURT: I thought that went down to the Nisqually.

A There is two Ohop Creeks. They both come off the hillside up here. One goes to the Nisqually and the other drains into Kapowsin Lake, but they are both called Ohop Creek. Then, up the Puyallup, we end up with spring chinook and coho again, going the furthest. They go past the power house at Electron, but can't pass the diversion dam for that power house, and the upper spawning reaches were cut off many, many years ago by that power dam. This, in general, describes the system, and the use of that salmon of that system.

120) Q You have done this to some extent, would you briefly

review, picking up any points not covered, regarding the way civilization's encroachments have affected the river?

- A Yes, civilization has vastly affected the river. The White River used to drain to the Green River, at Auburn, and was not a Puyallup tributary except where some of the water went across in time of flood, there was an area of flooding. A great many years ago now, the river was put into the Puyallup system instead of the Green, and there must have been a tremendous shift of salmon runs at that time. Then, the Mud Mountain Dam, flood control dam, is adverse to the salmon environment, however much it might do for flood control. They both bounce the flows up and down the river erratically, to the detriment of the salmon, and wash the silt out of Mud Mountain Dam at inappropriate times for salmon management, smothering both young and adults at times. We have made a plant of salmon from the hatchery in this area last year, and the flow was dropped very markedly in a hurry, and we lost a great many young salmon out in the willow bushes at the edge of the river, the water flow dropped and trapped them. That plant was aimed in part to provide fish to the Muckleshoot Reservation, which is on the White River. We also, I mentioned the diversion dam here. At the diversions, there are a series of fish screens. These screens are to remove the young fish from the water that is going into Lake Tapps and put them down the main river. There is, those are old screens and there are problems there, and they should be modernized. Then, I mentioned the loss of flow in here. On the main Puyallup, I briefly mentioned the diversion dam here, which stops upstream migration. We have great demand for gravel, and there are gravel operations in the river, flood control works are and have been all too often done the cheapest way to achieve flood control, to the detriment of the salmon resource, and that has been a factor. Finally, down at the mouth, we have pollution problems that we are continuously battling, so, civilization has had an impact on the Puyallup River system, just about everything that type of encroachment of civilization on natural environment I think you will find in any river.

(Re. 121)

Q How would you rate this river as a salmon producer?

A I would say, in spite of all the problems, the Puyallup is a good salmon producer. The historic runs have been good, the river produces a remarkable number of salmon for its size, and for the problems we have on it.

Q Could you describe the status of the Puyallup River salmon runs?

122) A They are not up to historical standards. I would put this in this context, the Department first began keeping good statistical records about 1935, about the time it was created, in fact, and in the context of since 1935, we know that this river can produce more fish than it is right now by a considerable amount, with the present problems on it, with some help, money, manpower, and otherwise, it can produce considerably more fish than it has in the past, and especially important will be to get the Puyallup Hatchery up to full production.

Q Is the Department making any efforts to increase the natural run?

A Yes, we have.

THE COURT: I want to ask a question, right there, when you referred to the Voit's Creek Hatchery, is the Puyallup Hatchery?

A Yes, I'm sorry.

THE COURT: On the Puyallup there is one hatchery?

A One salmon hatchery.

Q I asked you if the Department is making efforts to improve the natural salmon run.

A Yes, we have, our constant efforts to control gravel operations and stream diversions, the hydraulic code, that is an ongoing program, we have added more men, too. We have opened negotiations with the Corps of Engineers concerning the flow regulations at Mud Mountain Dam and how they are going to handle the silt from that dam, and some recent federal laws have laid a greater environmental burden on the Corps of Engineers, and I am very hopeful we will get a much better handling of Mud Mountain Reservoir for a fishery resource. I mentioned the diversion dam at Buckley,

(Re. 123)

and the fish screens being old. They must be modernized, and we are negotiating with the power people now to modernize those screens, and it is starting to move towards the design stage, so we will get much more efficient screening of young salmon so they can proceed to the sea instead of being dead-ended at Lake Tapps. We are also, through intervention of the Federal Power Commission, direct talks, want to get into the matter of providing better flows down the White River so we can increase production in the White River. The other major point of working to increase salmon runs directly, is we are negotiating over the point of this diversion dam and we are discussing with the power people alternatives. We have gone before the Federal Power Commission, or are going before the Federal Power Commission on this. We may of course settle it to our satisfaction before going to the hearing. We are either talking about proper ladders or proper facilities to get fish up above that diversion dam in the future, and if this is not the most favorable thing, then we will be talking about mitigation. By that I mean, getting funds from the power company to increase salmon production elsewhere in the system.

Q What is the Department doing in the area of hatchery production?

(Re. 124)

A We are increasing the productivity of the hatchery, both through modernizing our techniques, which has been general for all hatcheries, but we are going to increase the productivity of the hatchery itself. We are either in the process or budgeting for improved water supply, with a greater water supply you can put more fish in the existing ponds. We are going to rebuild a semi-natural pond we have on the premises, so it will be suitable for holding adults and for holding and rearing young for a time. We are going to build four new modern hatchery ponds. Our production there will better than double in the reasonably near future.

Q What is your outlook, then, for the Puyallup River system as a salmon producer?

A We are very hopeful. In fact, staff is quite confident that we are going to increase the total salmon produc-

tion of the Puyallup River. We have given it a higher priority in recent years, just the last few years, and are moving manpower and effort into that system. The salmon runs are going to be improved.

Q What meaning will this all have for fishermen?

A Catch. Fishermen will catch more fish. The surplus above spawning needs will be increased greatly. That is what we work on for fishermen.

Q Would you describe for us, from your own knowledge, the background of the Puyallup Indian fishery?

A The first we ever gave real notice to it was in the late 1950's, when the fishery began to build in size in the lower reaches of the river, and as it grew, expanded into Commencement Bay. It was virtually unregulated at that time, and grew to a point where the maximum catch on an even year, when pink salmon didn't run, don't run, reached in excess of 33,000 fish sold, and on a pink year, was a little over 46,000 fish sold from it.

THE COURT: May I ask specifically those years, and so on?

A May I look them up.

THE COURT: You will repeat that, please.

A I am—

125)

MR. BARER: Excuse me, Your Honor, you are going to tell what you are reading?

A Yes, I am. This is the 1968 Fisheries Statistical Report, prepared by the Department of Fisheries as a part of our obligation under the law to make annual reports to the Governor of the State. They are the records of the Department of Fisheries. Now, the figures that I will give are the Puyallup Indian catch, are the, are those sold in commercial channels. They won't include fish that were kept for personal use. The take, largest take on a pink salmon cycle, I gave you the wrong number, I was way too low, in 1963 the catch was over 75,000 salmon, taken by Indians from the lower Puyallup River and into the edge of Commencement Bay. The largest take on a year when—

THE COURT: Let's go a little slower, there.

A All right, that was in 1963.



THE COURT: All right.

- A The largest take on a year when pink salmon were not present, was in 1962, with a catch in excess of 33,000 salmon.

THE COURT: All right.

- A In 1964, following the year, the large year of the largest catch, there was litigation of this, the proper word, we were seeking an injunction, and the catch dropped. In 1965, if I remember right, the Puyallup decision came out of the supreme court in August, and there was very little catch and it ceased at that point. In recent years there have been just a few fish on the record, because any fishing has been largely as what we would call a poaching show, and surreptitiously, and the fish aren't openly sold in a market where our records can identify them.

(Re. 126)

- Q Has there been a change in the spawning runs in recent years?
- A Yes, there have been two changes. One, the, our men walking the streams at the time the Indian Fishery peaked and shortly thereafter, found a decrease, marked decrease in the spawning escapement to the Puyallup system.

MR. BARER: Did you say what years those were?

- A No, I was tying it to the year of the Indian Fishery, but in the late 1950's, early 1960's, our people found a decline in the natural spawning in the Puyallup system, and we were struggling to get the hatchery escapement up, and could not get it up to a significant point, in spite of heavy plants. Then, in the last few years, we have gone through enough cycles so that we can start getting generations of salmon back that were not heavily fished by that net fishery, and the spawning escapements are increasing and look pretty good to us at this time. We think that in the very near future we will have the natural spawning runs back to a satisfactory level, if not to full capacity.
- Q Has there been any change in your ability to rear hatchery fish?

27) A Yes, there has. The hatchery science or husbandry, maybe, is a better word, has increased in efficiency markedly, I know, in the last few years. We have developed a diet that is far superior to the diet we were using formerly, and fish grow faster, have better survival, and are healthier. This means they survive better and we get better return back for our efforts. The science of disease control has gone from the aspirin stage to the penicillin stage for fish very rapidly. We now cannot only prevent disease, we couldn't before, but we can treat them when they show. The average hatchery man now knows more about fish disease than the best fish disease man 15, 20 years ago. The other item is that we know more about and have the capability of getting the fish to a size and at a time when their survival will be much improved. If you release small fish, there is a break point, where there is very poor survival. If you get them above a critical size, survival goes way up.

Q Now, what is that critical size?

THE COURT: How old are the fish at that size?

A I am mainly talking now, in actual production, coho and chinook. We don't handle pinks and chums in that hatchery well at all, because they go out too quickly, but chinook, they are 90 to 120 days old when they are released, and this will vary, depending upon what size we have been able to get them to. We will release them about that time but it is dependent on how fast they grow in a particular year. Coho are 12 to 14 months of age before they are released. They are not prepared to go to sea as early; it is their natural condition. If you force them to sea too early, they will die. So we are meeting the natural, the best natural time of release.

THE COURT: Coho, again, is 12 to 14 months?

128) A Yes, we hold them in the hatcheries 12 to 14 months, and they stay the same length of time feeding in the streams before they go out. We are limited on pink and chum salmon because they go out to sea as soon as they can swim well, and you don't have the time in which to feed them and protect them to a significant degree, so at this time we can't make it pay off. I think this will change, also, in the near future.

**Q** Mr. Lasater, has the Department of Fisheries management policy for treating Indian Fishery changed since 1965?

**A** Yes, it has. At that time, I think our view of our belief concerning Indian Fisheries was made quite plain in the cases that went up. When the decision was made, and we read it, then it, in part, said that we were wrong, and that there was a special Indian treaty right, and to us, gave us an obligation to recognize their right, and we also have our increased ability, fishery science has advanced, it is a young science and has moved very fast since World War II. We are more confident of our ability to handle the fish runs in an area like this, a special Indian Fishery, than we were at that time.

**Q** Would you tell us first, in general, what has been done by the Department to recognize treaty rights, just generally?

**A** We have largely done two things. We have set up special Indian Fisheries, exclusive Indian Fisheries on the Columbia River for Squaxons, now Nisqually, for instance, the Makah Indian.

**MR. TANNER:** Can we restrict this to the Puyallup? This is what we are talking about, the Puyallup River.

**MR. GINGERY:** Your Honor, the issue is whether or not the Department, as I read the remand, whether or not the Department of Fisheries recognizes in its conservation program a treaty right of the Indians. I realize the Government did not object, but the Government has argued in previous cases it wouldn't be enough to show we did it in the Puyallup, but it must be part of the general regulatory program, not just a bone thrown here and there. Therefore, we feel that it is essential to show what we are doing. Then we will move on to treaty rights in the Puyallup Indians.

**THE COURT:** You may proceed. It is properly admissible.

**A** The other areas of special fishing rights are Nisqually, the Hoh, for the Hoh Indian, and the Quillayute River

for the Quillayute Indian, and, in addition, we have increased our hatchery planting to areas that are fished by Indians, fishing on reservations. We have done this on the Nisqually, a marked example.

THE COURT: I didn't, I was trying to write here. What was your last statement?

- A We have increased the plants of hatchery fish to rivers that flow through reservations, with a direct view that it will provide for Indian Fisheries. Our most marked example I think, on this, is for the Skokomish, where the river catch by Indians has increased greatly, over tenfold on chinook, due to the hatchery run, and on coho. The Indians, by their own regulations on reservations, have been fishing five days a week, and we have now recommended that on coho, this year, they fish seven days a week on reservation, because the hatchery stock will be that strong.

THE COURT: That is which river?

- A That is the Skokomish. We have built a new hatchery, we just dedicated it last month on the Soleduck River, which feeds into the Quillayute, and the Quillayute Indian reservation is at the mouth. We built the hatchery in the full knowledge that the entire run to that hatchery up the river would come through the Quillayute reservation. These are examples of what we have done.

Q What about internally, in your organization?

- A We have begun to allow time, money, and manpower to work on Indian Fisheries in our budget document that will be before the legislature this winter, we have set aside the Indian Fisheries as a special clientele. We refer to the sport fishermen, the commercial fishermen, in various times, and the treaty Indian fishermen. We are in the process of establishing in our next budget the position of biologist to work strictly with Indian Fisheries, and our emphasis on the work in training with Indian Fisheries, such as I mentioned on the Puyallup, we are spending time, money, and manpower that we would not spend in that way if it were not for recognition of the Indian Treaty, Indian fishing rights on those streams.

**Q** Does the Department do anything to recognize the treaty rights of the Puyallup Indians, in particular?

**A** Yes, we have set an exclusive Indian Fishery on the lower Puyallup for Puyallup Indians.

**Q** Why did you choose a special Indian Fishery on the lower Puyallup?

**A** We have the obligation of recognizing a treaty right.

(Re. 131) The quantum of that right, to use a legal term I heard, is not clear to me as a fishery manager. The actual area that it involves is not clear to me, so we had to choose where and what we might do. We looked at the marine areas, and one of the main reasons for not setting up a special fishery in a marine area such as we negotiated with the Squaxon Indians is that the Puyallup Indians, a number of them, we have met a number of groups from the Tribe, told us they did not have gear to fish in the marine area, that few of them would be able to exercise their treaty right if we put the fishery out in the marine area. The other item that, partly from talking to the Puyallups and partly from talking to other Indians, is the high value that they place upon subsistence fishing. If you put the fishery in a marine area, the fellow that wants to get a few fish to eat, can't afford to. You would have to have a boat with a large net and sea-going capability. It would interfere with his other job, and so forth. On a river fishery, he can put down a net and fish a few hours and get something to eat.

**Q** Would you describe the boundaries of the Fishery and why they were set?

**A** Yes, I was going a little further into that, so, in rejecting the salt water area, we also had to look at Commencement Bay, because it is close, and this is so clearly a milling area that we're unwilling to meet the biological burden. It is a straight conservation area, region, in discussions, we could not fish there, in looking at the map, one of the other things that we are quite sure of, is that we must not fish on the spawning ground, so, at least for a start, this is the town of Puyallup, for our first effort in this regard we chose an area just upstream from the bay, where we are, hopefully, as we see it, out of the primary milling area and below the spawning

(Re. 132)

ground. When you look at it this way, you are left with the region between the salt water and the milling ground and the spawning ground, and it puts you right into the section of river we have opened there for fishing now.

Q What are the risks involved in setting up such a fishery at that point?

A The biological risk, management risk.

THE COURT: From Puyallup down to a point just above the mouth of the river?

A It is the 11th Street Bridge, sir.

THE COURT: It is the 11th Street Bridge?

A To the city limits of Puyallup.

THE COURT: To Puyallup city limits.

A That is, I am not sure of the precise wording in the regulation. I could read it, but that puts you in the area quite closely.

THE COURT: That is above the bridge that crosses the Puyallup, over the dike road? Are you familiar with that bridge?

A I'm not quite, I think it's a bridge, but which bridge it is I'm not sure. I would have to fall back on the reading of the regulation.

THE COURT: All right. Do you have that regulation which describes the boundaries of that area?

A Yes.

(Plaintiff Department of Fisheries Exhibit No. 6 marked for identification.)

THE COURT: That is No. 6?

CLERK: No. 6.

THE COURT: No. 6 will be admitted.

(Plaintiff Department of Fisheries Exhibit No. 6 for identification was admitted in evidence.)

A All this says, between the City of Puyallup and the 11th Street Bridge. It would be a question of where the Puyallup city limits were, I suppose. In cases like that, if there is any doubt, if there isn't a bridge or prominent landmark, we always put up boundary markers on each

side of the river and on, or a small stream on one side, so people can see plainly where the boundary is. I haven't gone into details as to which is the case in this spot.

THE COURT: We are going to have the morning recess at this time. I would like to examine this.

### MORNING RECESS

Q Mr. Lasater, I believe you have a few remarks you want to make about your testimony on a few matters, to clear it up.

A Soon after I said we produced 80,000,000 pounds of salmon, I realized that that certainly slipped out. We do not produce 80,000,000, it is several million pounds, not 80,000,000 pounds.

THE COURT: I thought that sounded a little large. How much do you produce, do you know?

A Now, I would have to get some volumes and look it up. I would not rely on my memory now. It is several.  
(Re. 134) It is in the millions of pounds. I am not going to rely on memory on that one. The other item I wanted to mention is, Mr. Olson, the federal attorney, pointed out to me yesterday in talking about the special fisheries for the Makahs, that I may have said they have a special net fishery. If I did say this, it was in error. It is a special troll fishery. I'm not sure I stated it the other way.

THE COURT: Where are the Makahs?

A Neah Bay. We were talking about the fishery out at the mouth of the Strait of Juan de Fuca.

THE COURT: I don't recall that.

A I did speak of it. If there is an error, I did want to correct it. I may have, in fact, I think, I'm sure, I left the impression we had 32 hatcheries, when, in fact, we have 26 hatcheries. Six of them are operated with federal funds.

THE COURT: Six on the Columbia?

A Yes, I think I added them together for you.

THE COURT: You did.

A And I shouldn't have. The other thing that I have done, I asked our patrol staff about the line that, at the town



of Puyallup, and they are using the meridian, the bridge, which is slightly upstream from the city limit's line. In other words, we are actually, for convenience of everybody involved, allowing slightly more area than is in the regulation.

THE COURT: All right.

Q We have been discussing Indian net fishery on the Puyallup. I had just asked you what the risks involved, or were there any risks involved?

A It is a risky place to manage a net fishery from several view points. By this time the total run of the Puyallup that are going to spawn in the Puyallup River, are concentrated in a relatively small amount of water.

THE COURT: What kind of run did you say? I didn't get it. What run is concentrated?

A May we have it read back. (Reporter reads back answer beginning line 30, p. 134, and continuing at top of this page.)

A All the fish that are going to go to the Puyallup River to spawn or reproduce their kind, have to concentrate just by a matter of swimming up the river in this limited amount of water. They are all at one small point that acts like a funnel and net gear is and can be extremely effective. So you both have all the fish that are left, you have to work with to get a spawning escapement, are then right there, and you are setting a fishery with effective gear, and if you make a mistake at this point, where finally you are very specific to the Puyallup River, you are unable to correct it this season. If you make a mistake up by, or misjudge it, or your regulation is not entirely suitable up-Sound, you correct it through succeeding fisheries. At this point, your margin is very small, it takes very close management. Your knowledge of the fish runs has to be more precise. At this time we lack a backlog of data on that particular fishery, and data, the numbers involved in the fishery, information about it, are the most valuable items to scientific management of a fishery. We lack experience, you might say, in handling this particular fishery.

Q You mean this particular net fishery?

A This particular Puyallup Indian net fishery.

(Re. 136)Q Could you tell us—are you through?

A I was going to say from a biological point alone, if it wasn't for the supreme court decision, the risk would be considered too great and we wouldn't, under free choice, put a net fishery in that spot. The reason that we are doing this is because of the supreme court decision, and backed up by our increased confidence in our ability to precisely manage the run and our commitment to manpower to do it.

Q Is there any other place to do it in light of your—

THE COURT: In other words, you feel you can handle this situation, is that your statement?

A Yes, if we felt that we could not, we wouldn't have put a fishery there, but we are, I am pointing out that it is a risky, or a very tricky area to manage because of the nature of nets and the nature of fish runs as they come back to what is actually quite a small river, and as vulnerable as they are.

Q Would you reiterate just at this point, because I think it is relevant, why you couldn't recognize the treaty rights in the, you previously testified to this, above Puyallup or below the 11th Street Bridge?

A If we put the fishery between the milling grounds and the bay, where the fishery will fish again and again on the same fish, they will not escape during the weekend closure. When you open again the following week, then you take another dip from the same population, not knowing exactly how you are fishing it. So the fishing in the milling areas is avoided. This is a recognized principle of fisheries managers up and down the coast.

(Re. 137) The second thing is, you proceed up stream, we reach spawning area and it is very detrimental to a spawning stock of fish to have a net fishery over them. One, you remove fish in the act of spawning, but, in addition, the ones that you don't catch that are supposed to spawn are, they can't go through the spawning act without being driven from the spawning beds and they have a, their reserve of energy is getting very low, they haven't fed, they're living off their body oil, and just driving them about can use up enough of their remaining energy so they can't successfully spawn. They don't have enough

energy left. There are other things, but that is a couple of reasons for not fishing in spawning grounds.

Q In connection with this, I wonder if you would discuss, from your own knowledge, the background of setting up the rules for a special fishery on the Puyallup?

A Yes, we, of course, had a closure for some years, and during that period, and increasingly in the last couple of years, we have had discussions with a number of interested parties. We have discussed it with several groups of Puyallup Indian people representing the Tribe or representing individuals. We have discussed the fishery from a number of angles with federal fisheries people, with the Bureau of Indian Affairs, with a view that if, when may a fishery be established. We told them that we would have to rebuild the runs to a degree, at least. Last year, we ended up, for the first time, with a group of hatchery fish, coho, back to the hatchery that were surplus to our needs. This was the first occasion of being able to produce a surplus group of fish in that river since the unregulated Indian Fishery. The—

138)

THE COURT: Just a minute, now. I want to get that statement. This last year you say was the first time you have had a surplus, this is 1969?

A Yes, '69 run, fall of '69, yes. Now, we couldn't know until the fish arrived that we have had, reached this point. We couldn't predict we would have this. We had to wait to see it. Our, the—

THE COURT: Wait a minute, now, your statement was, the fall of '69 was the first time you had had a surplus since the unrestricted Indian fishing?

A Yes.

THE COURT: When did that end?

A That ended in, virtually, in '64. There was a little in '65, and, of course, we have had some Indian Fishery on the river since, but I am referring largely to the 1964 as being the last period of heavy, unrestricted Indian fishing on the river.

THE COURT: Now, that was five years. So, you have different periods of coming back, have you not, to the stream?

- A Yes, we expected the silvers to recover first, and we concentrated more heavily on silvers, to bring the river back to production at the earliest possible date. There is one species.

MR. BARER: Did you say it was the first year for silver returns that was surplus?

- A It is the first return of silvers that was surplus to our hatchery needs.

(Re. 139)

THE COURT: That was '69, that was silvers you're speaking of, or cohos?

- A Yes. The wild stocks still have not come to full level, so, when we saw this, we endeavored to see how we might allow the Puyallup Indians, or recognize their treaty right on these fish which are surplus to our needs, so we set the Fishery at a time when chinook would largely be clear of the fishery, they would be upstream, they run earlier. And at a time when our hatchery stock would be concentrated in the river. There will be wild coho that we really should protect as best we can, but we are concerned for those, but the fishery is centered on that hatchery run. Now, one reason for the time-lag, of course, is the generations of fish. Silvers have a three-year life cycle, and the chinook have a basically a four-year life cycle, three, four, and five, and in addition, they just naturally don't seem to recover as quickly as coho. We commonly believe that if the chinook run has to respond from a low ebb it is going to take three generations. It may take longer, but we are always hopeful we will see a significant increase in three generations with the—

THE COURT: That would be 12 years, isn't that right?

- A Yes. Now, hopefully, we can short-cut that with the hatchery stock, but the wild stock, I'm not at all certain we can short-cut that.

THE COURT: You have to plant fish from that river, do you not? You can't get eggs from another river?

- (Re. 140) A Yes, we can. There is a definite principle, I think, that we have to look at here, and that is, that, one, there is a limit to which you rob another river, which is one way

of putting it. The next thing is that the most suitable fish for a particular river are those that are reared there, and you always endeavor very hard to build up a native hatchery stock or a hatchery stock to use over and over again. They survive better, they are accustomed to that river system. Then, finally, the greatest production from the river is going to be to have a good solid hatchery stock there that can handle itself, it is not dependent on other rivers and other production, and add this to the natural production, so that they are adequate, and you have a system that is working, one augmenting the other. This is the way to have the most fish in the Puyallup. You can augment the Puyallup system, and we have done this, and will do it to get that hatchery up to peak production as quickly as possible. Our ultimate goal is to make it independent of other river systems.

Q (by Mr. Gingery) In discussing the return of the silver, you used the phrase "surplus to our needs" twice, I think. What needs were you talking about?

A The need to fill that hatchery run to full capacity.

Q We have been speaking, then, about the hatchery run?

A Yes. Yes, the Bush Creek has some natural spawning which we will fill by letting fish go by the rack but, virtually, the run to Bush Creek is a hatchery run.

Q The question to which you have been responding is what went into setting up the rules for the Puyallup Indian Fishery. You began to discuss discussions with the Tribe. I wonder if you have any more on that subject.

141)A Yes.

THE COURT: You said you had discussions with interested persons. You did have discussions with the Tribe. I don't think you said that.

MR. GINGERY: I thought he had.

A This was my intention, interested groups in the Tribe, several groups came and talked to us about their Fishery, their treaty rights, and the runs on the Puyallup. In the past year, there have been several such meetings, and—

THE COURT: Is that with different groups in the Tribe?

- A Yes. We met with Mr. Satiacum and some people that were with him. We have met with Mr. Wright and members of the Tribal Council that were with him, and we have met with Mr. Cross and people that were with him, in fact, if I remember right, there was at least one meeting where more than one group was involved.

THE COURT: Who was the last one there?

- A I must have mentioned Mr. Silas Cross last.

THE COURT: Oh, Cross. All right.

- A The next step was to, well, and the Director of Fisheries, Thor Tollefson, announced last year that if the runs came out at all as we expected, we would have a fishery for coho this year, 1970, so that was an announcement that he made as a matter of, you might call it, policy, we then proceeded to ask the staff to prepare their recommendations for a fishery, binding them with certain instructions as to how we read the supreme court decision. Within that framework we should set up a fishery for Puyallup. We arrived at suggested regulations and then went through the state Administrative Practices Act procedure that we have to go on under that Act, we sent out our regulations to as many concerned individuals as we knew of or could get to, published them in the paper, sent copies to the Puyallup Tribe so that they would know the regulations that we were proposing, this was done in excess of 20 days, I think that's the requirement, we certainly met the requirement of 20 days' notice before hearing. We then had a public hearing where the Fishery was explained, the runs were, the status of the runs was gone into by Department staff, the regulation explained, and the reasons for it explained, and the, we go through several stages in this, one, there is a Department presentation, two, we read into the record any letters that we have received regarding those regulations, then we allow people that have come to the meeting, members of the public or other interested agencies, to speak on the regulations as they chose. That was a long hearing. There was much said.

THE COURT: Where was that held?

- A That was held in Olympia, in the General Administration Building. We did not make a decision at that meet-

ing, as is customary with the Department, we don't make our decisions on the same day that we hear testimony. We have found that we don't have time to consider all of the items that have been brought up, so we then set, we have announced in our material that we hand out, we announce at the meeting the date upon which we will adopt regulations, hearings, and the regulation hearing for the Puyallup Indian Fishery was postponed, the adoption hearing was postponed once because we were getting a lot of information in, and threats of additional law suits, and enough material that the Director wanted further time to consider his action. And then, finally, we had the adoption hearing where we adopted a special gill-net fishery on the Puyallup River, for Puyallup Indians.

Q With regard to that Fishery, has anything been done by the Department to protect it?

A Yes. Realizing that we were going to have a Fishery there, we have put in special regulations, the one that I mentioned, closing a portion of East Pass was to provide, make sure that we provided fish sufficiently to both have an Indian Fishery and a sufficient spawning escapement. We closed Commencement Bay for a time to sports fishing, to protect the chinook salmon as they were coming through. These are specific regulations to allow more fish to go to the Puyallup for the Indian Fishery and for spawning escapement.

THE COURT: What dates did you close the Commencement Bay to sports fishing?

A I would like to refer to the actual regulation, if I may.

MR. GINGERY: I only hope I have it.

A I think we have an affidavit, yes, I'm sure we do.

THE COURT: Well, if you don't have it readily available, you can supply it later.

A I can say this, it was basically the latter part of August and the early part of September, that the fishery was changed from a total closure to weekend fishery, and then went back to seven days on the 21st.

Q (by Mr. Gingery) Does the Department of Fisheries plan to assure the Puyallup Indians a continuing and meaningful fishery?



(Re. 144)A Yes, we do. The two steps, one, I think most important, is to build the Puyallup River run up so that it is actually above average, and the effect of this will be that your general regulations further out, which are going to protect, sort of the average condition in the fish run, will actually, under-harvest Puyallup, because it will be above average, so that we have an extra group of fish moving to the Puyallup, then we can and will hold whatever restrictions are necessary where we can specifically manage Puyallup fish, as we have done in East Pass, to make sure that a quantity of these fish get through the river.

Q What about if you over protect?

A As we understand fish runs, there are two things that happen. One, you just plain waste fish. There are fish that exceed the feeding capacities of the stream, and they are large wasted. The other thing is that in a number of areas, after you reach a certain spawning level and go beyond it, your production actually drops. Over-spawning has been shown to be actually harmful. You don't get anything for it, you depress the run by over-spawning.

Q Why were three days, only three days set for the coho hatchery fishery in 1970?

A With a fishery of this type, which with gear as highly effective as gill-nets are, you have a removal of at least a considerable percentage of the fish that are present, and—

THE COURT: I'm sorry, I didn't catch that question.

(Re. 145) Q I don't believe I actually laid the proper foundation, that's why. How long, it is in the record, but how long is the Puyallup Indian Fishery, can you describe its time limits?

A They will fish three days a week each week, starting on the 21st until, in late October—

THE COURT: Is that September?

A 21st of September until in late October, three days per week.

Q Why were three days set?

A The, we have an efficient piece of gear in the gill-nets, and a limited area to, the fish will be moving through there, very vulnerable to the gear, we could have quite a high percentage of fish that are present during the time of fishing just plain removed. I have mentioned that we fish in areas of passage, that is so that in a closed period fish actually move out of the fishery, and protected, the four days, are to allow the fish to come from the milling area, Commencement Bay, pass completely through the fishery and into the spawning areas above without being fished, and the four days, we believe, is sufficient to pass a significant quantity of fish. So it is to allow a spawning escapement through the fishery. You must allow them time to move.

Q Why was no season set for chinook salmon in 1970?

A Chinook salmon, in the Puyallup system, have not been built back to a point where they can stand a fishery without damaging the potential future runs. The quicker that we build the run up so that we can have a surplus of chinook, the more total fish over a long period we are going to have. If we fish too hard now, we are actually going to give up fish in the future generations.

146)Q You discussed the cost of managing an exclusive gill-net fishery on the Puyallup Fishery?

A It is a matter that we will have to acquire as quickly as we can a backlog of data. That is a prerequisite to proper management. We will have to put the people out there to do it. We will have to increase our hatchery effort in that area, in this system, so that we can guarantee holding that run up. The artificial propagation is a part of this. This would require money and manpower, and we are increasing our efforts to improve the natural environment in negotiations with the power dam people, Corps of Engineers, gravel operators, people, county people doing flood control, we are increasing our effort in that regard, to get the natural production of the Puyallup system up to as high a level as we might. All this takes effort, manpower, and you can put it in terms of money.

Q In terms of money, how is the Department of Fisheries funded?

A Through the general fund, from taxation. There is license money from the commercial fishing, and there are, of course, fines and such. This goes into the general fund, and in the past has supported only partially our fisheries program. We get tax money set aside.

Q Does the Department collect statistics on Indian Fisheries?

THE COURT: Is there any license? There is no license for sport fishing, is there?

A No. We should make sure, I think that is quite clear in the record, there is no license for sport fishing for the fish labeled food fish in the State of Washington, the fish under jurisdiction of the Department of Fisheries, this includes salmon.

(Re. 147)

THE COURT: That's all I have.

Q (by Mr. Gingery) Does the Department collect statistics on Indian Fisheries?

A Yes, we do.

Q Do those represent all fish caught by the Indians?

A No, they don't. The records are of those fish that are sold in commercial channels, fish that are the Indians' catch for their own use are not in our statistics. We have never collected this kind of statistics. The fish that they may, say, sell on their own, one at a time to friends or acquaintances or in the community, don't get into our official records, and then there are a lot of people with Indian blood that fish in all of our commercial fisheries, and when they sell their fish they are just part of, for instance, the troll catch. They are not asked, for instance, if they are Indians. For an example, Ken Payne, the chairman of the Quillayute Tribe, is a troller. When he comes in he is actually selling his fish on the reservation a good deal of the time, but they are just part of the troll catch. They are not separated as Indian catch.

Q What license is required of Indians commercially to fish for salmon?

A None. There was an early court case that said Indians are not required to have a license to commercially fish in the usual and accustomed grounds, but as a matter

of policy we do not question the usual and accustomed grounds. We allow any Washington Indian to fish in any commercial fishery without a license.

Q Thank you, Mr. Lasater.

148) THE COURT: That would be in marine fisheries as well as the rivers?

A Yes.

### CROSS-EXAMINATION

by Mr. Tanner

Q Mr. Lasater, calling your attention to the resolution that closed the part of the east passage, how was the resolution passed?

A It was an emergency regulation, and on emergency regulations the Department decides what is to do, puts it in proper form, and it is filed with the code reviser and takes effect immediately. It is in effect for 90 days unless changed.

Q Can you then undo that resolution, an emergency, in emergency session again?

A Yes.

Q In other words, you can do it or undo it at your will?

A No, not entirely at will. We have to give a reason for doing it.

Q That is good conscience?

A No, it is a requirement of the law.

Q As you passed it, you can unpass it?

A If the conditions warrant it, yes, we could.

Q Now, there are no Indians sitting on any boards that pass or unpass resolutions, are there?

A No, under law that is the power of the Director of Fisheries.

Q But no Indians participate in the resolution?

A You mean emergency regulations?

Q Or any other kind of regulations.

149) A Yes, we had a hearing and we had a great many Indians that participated in the public hearing.

Q Did they set the policy?

A They did, insomuch as the, we listened to what they have to say to us and respond to it.

Q And the person who listened to the Indians, who is the person that listens now? Are any of those people Indians?

A The director is not an Indian.

Q Anybody else?

A In the Department?

Q The staff.

A We have some Indians on staff. They don't participate in regulation of fishing rights though, I don't believe.

Q Or decision making?

A No.

Q That is especially true of the Puyallups now, that is what I am talking about, the Puyallup Indians, they are not the director nor do they participate in any decision making of your department?

MR. GINGERY: Excuse me, I have allowed this questioning to go on for a few moments, trying to figure out the relevance, but I am unable to. Can counsel tell us what material fact that his questions are directed to? We are here to determine whether or not the Department of Fisheries recognizes the treaty rights and not whether a test of blood is administered before one goes to work for the Department of Fisheries.

MR. TANNER: Is that an objection or a speech? Is he objecting specifically?

MR. GINGERY: Yes, to the whole line of questioning, unless I am assured of its relevance.

THE COURT: I think he's answered already. He says no.

MR. TANNER: That's correct. Thank you, Your Honor.

Q Now, I believe you said that it was just this year that these rules have been put into effect on the Puyallup Fishery as to the Indian Fishery?

A This is the season we are talking about.

Q Because your figures show that other than very few fish,

there was no Indian Fishery from 1964, at the start of these law suits, until the present time, is that correct?

A That's correct.

Q Now, you say, in the promulgation of these rules, interested groups have discussed these proposed regulations and rules with your Department from time to time?

A Yes.

Q Now, is there any place in your records that would show that the Puyallup Indians, as a tribe, not individuals now, as a tribe, have participated in the promulgation of the rules or had any—no, I will withdraw that question. Is there any place in the rules that you are talking about that you have promulgated for the Puyallup Fishery? Do you understand what I am talking about?

A I'm not sure, you have to finish, I think.

Q There is a Puyallup Fishery now, correct?

A Yes.

Q Was there any board or anyone, the Tribe I'm referring to now, did the Tribe approve or recommend those rules or regulations?

151)A Mr. Tanner, I have a great deal of trouble right now figuring out just who the Tribe is.

Q So then your answer is no.

A No, it's not.

Q What is it?

A There is a problem with which of the groups that we talked to represents the Tribe truly, and it's impossible for me to answer your question about whether the Tribe took official, or whether we were talking to the Tribe. I don't really know. We attempted to talk to all groups that said they represented the Tribe.

Q For argument's sake, is there any segment or faction of the Puyallup Tribe that you refer to, approved or recommended the regulations?

A Not to my knowledge.

THE COURT: I think we are getting, we are beating around the bush, Mr. Tanner. When we started this case, people were here, said there was no organized Tribe, at least they had diffi-

culty in saying who the Tribe was. They said that and so did you.

MR. TANNER: I have never taken that position, Your Honor.

THE COURT: We had two people claiming to be chairman at the beginning of this hearing. They got up and said the Tribe was split up and one thing and another, and could not define the Tribe.

MR. TANNER: What I am referring to, Your Honor—

(Re. 152)

THE COURT: I don't know, they were not witnesses, but I was calling on parties, or who they were.

MR. TANNER: The people I represent, my position, is that any and all regulations promulgated by Mr. Lasater's department or the Department of Game are without the approval, the direction in any way of the Puyallup Tribe.

THE COURT: If you are representing the Puyallup Tribe, I wish you would define who the leaders are.

MR. TANNER: I represent Mr. Cross as the chairman of the Puyallup Tribe.

THE COURT: He testified Mr. Cross was one of the people there.

MR. TANNER: That's correct.

THE COURT: You are contending Mr. Cross is chairman of the Tribe, representing him?

MR. TANNER: That's right.

THE COURT: All right. You may proceed.

Q (by Mr. Tanner) It is your answer that none of these groups that you have talked about has approved or recommended these rules and regulations that you refer to, that are now in effect?

A I have no knowledge of that.

MR. TANNER: No further questions.



**CROSS-EXAMINATION**

by Mr. Olson

153)Q Mr. Lasater, you started out testifying that conservation was wise use.

A I made that statement, yes.

THE COURT: Just a minute, for the record, Mr. Tanner, the reason I stopped you and objected, I was attempting to get the Puyallup Tribe officially represented here when this suit started, because I wanted the record to show they were officially represented.

MR. TANNER: That's correct.

THE COURT: And now, if you, and I understand this is Mr. Cross here.

MR. TANNER: That's correct.

THE COURT: Mr. Cross came forward and said he was chairman, and you represent him?

MR. TANNER: That's correct.

MR. CROSS: Your Honor, how could we be officially represented when there is two people on the chairman here, claiming to be chairman of the Puyallup Tribe?

THE COURT: That's the problem the court had from the beginning.

MR. CROSS: Your Honor, can you decide that question?

THE COURT: I don't think I can.

MR. CROSS: If you can't decide that question, how could you decide, get us into court officially?

THE COURT: Mr. Cross, that is one reason I tried to let as many people here as want to be represented, I mean, the fact is, now there were two women who came in here to be represented, Mr. Satiacum is represented by Mr. Tanner, I gave an opportunity for the gentleman who just came up to be represented, he said he didn't care to be heard. I made every effort I could to see that without doubt everybody would be represented some way or another. You claim to represent the Tribe, and you have an attorney.

154)

MR. TANNER: The difficulty will be apparent, it's going to come, that Mr. Cross, on behalf of the Tribe, such as he represents, is objecting to the jurisdiction of the court, as to the necessity of the rules promulgated by the Department of Fisheries and Game. In the instance of the Game Department, there is no compliance with the equal protection laws of the United States Constitution.

THE COURT: I understand all that. This is just the matter of getting it in the record so it won't appear we have proceeded here without the Tribe being properly represented.

MR. TANNER: Our position is clear. We do not agree that this court does have the jurisdiction, as long as we are on the record, does not have jurisdiction over either the persons of the Puyallup Tribe or the provisions of Article 3 of the Treaty of Medicine Creek.

THE COURT: That is a general argument on behalf of all members of the Tribe, I assume.

MR. TANNER: That's correct.

THE COURT: I am not deciding that now. This is purely a matter of representation. Mr. Cross is here, you are here, these gentlemen are here. All right, we will proceed.

MR. CROSS: I'd like to know, for the record, if these people from the Bureau are working for Mr. Wright. There are two factions here.

THE COURT: The United States says they represent the Indian Tribe, I don't know.

(Re. 155)

MR. CROSS: Under what authority?

MR. TANNER: This is a problem, Your Honor.

MR. CROSS: Your Honor, for the record, we have not given permission for these people to appear for the Puyallup Tribe.

MR. SENNHAUSER: I think it's clear from the decision, the Tribe is not a party to this action, neither are its officers. I think the Supreme Court made that clear in a footnote. The suit is against,

supposedly, individuals. I am contesting the jurisdiction of the individuals too, but I think it should be made clear that the Tribe is not a party to this action. The Supreme Court decision stated that.

THE COURT: We will argue that when we get to it. But I question, I brought this up because I didn't want it to appear I was discriminating against these people, but rather trying to get them to appear of record as being represented here. All right, let's proceed.

Q (by Mr. Olson) Your definition was, conservation was wise use. I think you set out three criteria which are part of your management program?

A Yes.

Q If I am not mistaken, surplus, or seed stock, in other words, escapement for planting or—excuse me—escapement for continuing the runs year after year?

A That's part of it.

Q Secondly, the manner of fishing controlled so as not to cut into the seed stock. That's really the same thing.

A No, maybe it's a subtle difference, but I think I used an example, that, one, you have to have a surplus, but  
 156) let us suppose we have a small stream and all the fish that are going to that stream are contained in one or a few pools, which is often the case, you have a surplus, maybe a dozen fish that is surplus, if you make one sweep through the pool with a beach seine, just one, you not only take your surplus, but you are cutting into spawning stock to boot, there is a distinction, in recognizing a fishery that at some point you can control, it will inevitably take spawning stock as well as surplus, one is a condition of the stock which must be met, the other is a condition of fishing that must be met, so, to me, there is a distinction.

Q Then, the third point is the manner of fishing must not be destructive?

A Yes.

Q By that you mean destructive of the part that is harvested?

A No, the part that is harvested is dead, but, for instance, you dynamited a hole, you would kill most of the insect larvae that are in the bottom that are going to feed young salmon. You would kill young salmon and other species. That would be a destructive fishery, and possibly destroy the runs and fish at the spawning area. It goes far beyond just killing the fish that you want to take.

Q So, in other words, your definition of conservation does not deal with the question of the harvest, necessarily, your definition of conservation refers to the propagation of a run of so many fish each year, what happens to the harvest is not part of the definition you gave?

(Re. 157) A If you went back to the first item, it says you harvest that group that is your surplus to your spawning needs, and that encompasses all harvest. It is an all-inclusive statement. It includes gill net, sport fishery, Indian fishery, whatever fishery you have that remove fish.

Q Now, did you qualify your definition of conservation when you went into this and described what you call a rational fishery? Was that a qualification on the conservation?

A Would you explain what you mean by that?

Q Well you indicated a rational fishery, in other words, it sounded to me like you talked about public relations, Labor Day, you don't open until the boats are, for non-fishermen, are out of the sound area, you started the day after. That is what you call a rational fishery?

A I would say this, that some laws that are passed, which are binding on us, would reduce our flexibility in managing stocks, because the people pass laws that say you will manage it this way or that. This will, I think, to a degree, reduce your optimum yield, but the rational fisheries are those choices which we can make aside from conservation. In other words, there are three ways to do something, each of which will serve the goals of conservation, and we can choose one of the three.

Q If they serve equally as well?

A Yes.

Q And now, you have testified as to, in this particular case, allowing under special regulations some Indian net

fishery in the Puyallup River, and in your opinion, is this consistent with your definition of conservation?

158) A I think the word allowing is a tricky one. They either have a right or they don't. If they have that right, we are not allowing it, we are regulating it only, but I believe that we can do this. I believe that we can manage the salmon stocks there with the net fishery that we have set, and maintain our conservation goals.

Q Consistent with your definition of conservation?

A Yes, I believe we can do this.

Q Now, when you start talking about the surplus over the seed stock, you are talking about a very large number of harvestable fish?

A May I go back to the former question. I left out one part, it might be helpful. What we are going to do is increase our expenditure of money and manpower to make sure that the resource is handled properly. It is going to cost us more to have this fishery than if we did not have it, and, but I believe that this is a burden that we are supposed to assume, now if spending more money than otherwise would be required, this does, I think, get into it a little bit, we have been given a burden by the Supreme Court that goes beyond strict conservation. We are assuming that, and, I don't know if that clarifies it for you, but there is this also in my mind, if it costs more money to manage a fishery and you assume that cost, this isn't strictly a conservation issue.

THE COURT: We are going to recess until 1:30.

### NOON RECESS

Q Mr. Lasater, can you have a regulated net fishery on the Puyallup River consistent with your definition of conservation?

A We believe so. I would limit my remarks to salmon.

159) Q Now, when you start talking about, in your definition of conservation, a surplus over seed stock, you are talking about the harvestable crop, is that correct?

A Yes.

Q What, when you manage this crop, this salmon crop, what is your primary concern? Manage it for what? Is it for food, is that the primary purpose?

A There are two purposes. They are built into the code book. There is an allowance for a commercial fishery, which I would say is for food, and for livelihood, and a personal use fishery, which can be to catch fish to eat or for sport, for recreation.

Q Would you say that the food management one and the commercial one is most primary or are they equal?

A I think you have to relate this to the species, for instance, the chum salmon almost never bite and you can't manage them for a sport fishery. They have to be almost entirely managed for a commercial fishery. The coho and chinook salmon bite very well, and you try to give the, each legal user-group a good opportunity to fish and harvest fish.

Q Now, annually, let's take last year, if you have the figure, what was the total catch of salmon?

A I haven't brought last year's figure with me.

Q Do you have an estimate?

A I just don't flat out, don't remember last year's catch figures.

Q The year before?

A I think what I have with me is 1968.

Q What is the total catch of salmon in '68?

A Of all five species, all areas?

(Re. 160) Q Of all salmon.

A I'm not sure but what I have to add together catches by year and area.

Q Just, I don't want an adding machine figure.

A This is a table, labeled 1968 State Salmon Catch by year, numbers of fish. There is a total, it is 3,086,305.

Q How is that split up between commercial, sports, and Indian fishing?

THE COURT: That is all salmon on the Puyallup?

A No, that is state-wide, by commercial gear, that is by commercial gear, let me get the sport catch.

THE COURT: Let's stick to the Puyallup.

A Oh, his question was for the Puyallup?

Q My question was, first of all, total state-wide, then on the Puyallup.

A Am I to respond, Your Honor?

THE COURT: I guess you have already given the state-wide. Let's have the Puyallup.

Q He hasn't given the sports figure state-wide.

A For 1968, I believe I do. I have it by species, chinook salmon, for a total state, 262,600, coho, 552,400, and it is an off year for pink salmon, so that is it. Now let's see, we have some river fisheries also.

Q It's a little less than a million for a commercial, or for a sports catch, somewhere between 900,000 and a 1,000,000?

A It looks like it's closer to 800,000.

Q Now, isn't the management of the harvestable crop a matter of allocation of the crop between these two user-groups, by the way, what was the Indian catch in those years?

A We have part of the Indian catch, certainly not the catch by people of Indian blood in the State of Washington. The catch in special Indian Fisheries, whether reservation or by regulation—

THE COURT: Is this all over the State?

A All over the State.

THE COURT: Is there any purpose in those?

MR. OLSON: Yes, Your Honor, I believe there is. I am trying to show this is a matter, the whole question of fisheries and game is allocation among user-groups, and the Indians have not been treated equally. Again, I think this gets into the question Mr. Tanner raised about equal protection, and also recognition of the treaty right.

THE COURT: If there is no objection I guess you can go ahead.

MR. GINGERY: I'm trying, Your Honor, to figure out what is going on.

THE COURT: I doubt if we are—I don't think that that is a matter of the whole State.

Q (by Mr. Olson) Can you testify as to what—



**THE COURT:** Because there are several different tribes. There is no testimony as to how many tribes, how many Indians. You just open up a whole new, not just one vista, several vistas.

**Q** As far as the Indian fishing, fine. Can you break down the commercial and sports catch as to what was Puyallup?

**(Re. 162) A** No.

**Q** Do you know what the Puyallup Indian catch last year was, on the Puyallup River?

**A** No.

**Q** There was no legal Indian Fishery in the fisheries view last year on the part of the Puyallups by net?

**A** There was no fishery by State regulation by Puyallup on the Puyallup last year.

**Q** Now, you indicated that your management, you said, social and economic factors affect fishery management, is that correct?

**A** Yes.

**Q** Among those factors, are included, I would assume, the pressure or lobbying of commercial and sports groups. Does that have some effect on you, public relations?

**A** A fair handling of the fishery, whether it's public relations, as such, or not, I don't know. We listen to any fishing group that wants to talk to us, have meetings with them, and consider their viewpoints.

**Q** Are some of their groups for example, the commercials, fairly well organized?

**A** They have a number of organizations.

**Q** Do you know how many commercial boats there are in the sound fishing this, all the runs, but also the Puyallup run when it is still up, coming down the Straits and on down?

**MR. GINGERY:** Your Honor, I believe what is relevant here is whether or not the Department gives recognition to Indian treaty rights and not whether or not they give recognition to commercial rights. If there had been testimony we gave no recognition to Indian rights, perhaps this would make some sense, but I think it is irrelevant,

**(Re. 163)**

whether or not we give, we listen to the pleas of commercial fishermen, unless counsel is ready to listen to pleas of the commercial fishermen to the complete exclusion of listening to Indians on the treaty.

THE COURT: I think this is getting out of hand. I think the whole question is relative to what is being done as to the Puyallup, in relation to the Puyallup.

MR. OLSON: Your Honor, the witness testified what happens on the Puyallup is affected by what happens up in the Straits and down in the sound as far as the fish run is concerned.

THE COURT: That's true, but—

MR. OLSON: And I think the issue raised by the supplemental petition is whether these regulations are reasonable and necessary. I think that again, goes to—

MR. GINGERY: Your Honor, I wish to point out again that the issues raised here are raised by the Washington State Supreme Court.

THE COURT: That's correct.

MR. GINGERY: They have sent a judgment on remand.

THE COURT: I think that case demonstrates that. You have been permitted to come in here. I don't think you can just try this whole case over again. I think you are bound by what happened on those appeals and those cases. I'm going to sustain the objection.

Q (by Mr. Olson.) Now, the Puyallup run comes all the way down this whole slot, is that correct?

A That's correct.

Q And in recognizing the Indian fishing right, you recognize that the Indians have a right to some portion of these fish under the treaty?

A We have set up a Fishery for them.

Q Do you recognize that they have a treaty right to fish?

A Yes, they have a treaty right.

Q Now, if you were to limit the commercial fishing up here, there would be more fish coming down and up the river for the Indian Fisheries, is that correct?

A We limit it now.

Q If you limited further, there would be more coming in for the Indian Fishery, is that correct?

A Yes, there would be.

Q When did the Department of Fisheries start regulating the salmon runs?

A I believe it was 19—either 1933, 1935, somewhere in there.

Q Prior to that, was there any management on the salmon?

A Yes.

Q What was that?

A There was an old fish commission, State of Washington, you're getting far enough back, I don't remember the proper terms for it.

Q How far back has it been managed, has there been management of the salmon?

(Re. 165) A I don't really know, I can't remember, there was county management even before there was state management. I might say, that the earliest management date that comes to mind is 1895, when one of the first hatcheries in the State was built. It stems back a long ways.

Q During all this period, the Indians, of course, fished this area, particularly the rivers, 1890's, early 1900's, up to the present time?

MR. GINGERY: Mr. Lasater was called as Assistant Director of the State Department of Fisheries and has not been called as an expert in anthropology and history here, but as in biology and management of the Department of Fisheries. I object to any questions about history and anthropology.

THE COURT: I think it is beyond the scope of the direct examination.

Q When did the State begin to regulate the Indian Fisheries in their usual and accustomed places, actively begin to regulate?

A Shortly after we had time to read and assimilate the Supreme Court Decision.

Q No, when did the State begin to regulate and prohibit Indians from exercising their treaty rights?

A I don't really remember that far back, when we were applying state law to Indian Fisheries, I don't know the date in history that might have occurred.

Q You indicated there was an Indian net fishery on the Puyallup until about 1964, when this action was begun. Is that correct?

166) A There was a period when the only fishery on the Puyallup was a sporadic fishery and in the nature of a small fishery that was prohibited, prosecuted, so it wasn't an unlawful fishery, putting a net in, taking it back out, but the fishing where it was stated, that the State had no right to regulate the fishery and was an open fishery, unregulated by the State, that started about 1958.

Q So the Indians, from 1958 to 1964, is that correct, were without any in the Puyallup River until this action?

A There was a period there when the fishery became much more intense than it had been and was prosecuted at a high level.

Q Prior to that time, when the Indians first started, it wasn't necessary at that time to cut off the net fishing?

A For whom and where, please?

Q We're talking about the Puyallup River, the Indian Fishery, net fishery.

A The view prior to the Supreme Court decision was that if the fishery was not allowed by State regulations, that it was, in fact, unlawful.

Q But you didn't enforce that until 1964?

A Yes, it was enforced. We had a time in the late '50s and '60s when it was the problem of whether or not an Indian treaty fishery can be regulated was very much a matter of debate, and ended up in a very large court case.

Q Now, you indicate the Indians have a fishery, is that correct?

A Yes.

Q So, in regulating, you are actually, in regulating the Indian fishing, you are not giving them so many days, you are regulating how much fishing they can do, is that correct?

(Re. 167)A I believe we have the same understanding.

Q In essence, when you say there is a three-day fishing period allowed on coho, you are actually saying you have limited them, you have regulated four days when they can't fish, you have taken away four days rather than giving them three?

A You can state it that way, yes.

Q And now, you indicated that now you are starting to get a surplus, an over-average surplus, more fish than you are going to be giving the Indians. Now, the run, I think you said, in 1969, you found got more back to the hatchery?

A Coho to the hatchery, yes.

Q Now, you are going to provide those to the Indian Fishery?

A As best we can.

Q Couldn't this be stated another way, if you limited the commercial fisherman up farther up the sound and out in the Straits too, a bigger run would come to the Puyallup River, this surplus now is given back to the commercial fisheries, couldn't you say in that sense you could limit the commercial fishery without, two years ago, say, let the Indians take more fish, same escapement, but the surplus could be given to the commercial?

A I don't understand you at all, sir.

Q Now, your prior position, prior to, I would say, the last, what, six, seven months, has been a total prohibition of net fishing, is that correct?

MR. GINGERY: If counsel is suggesting the witness has lied, his prior, as to the prior position of the Department of Fisheries?

THE COURT: I think he has answered at least three times. When the regulations came into effect it was September 21, there has been no fishery before that, I mean, the special regulations concerning the fishery on the Puyallup.

(Re. 168)

Q My question, Your Honor, is, that you filed an affidavit in this case, is that correct, on a supplemental petition is that correct?

A I don't remember.

Q But at that time, say, a year ago, your position was the position of the Department of Fisheries, therefore, your position was that a net fishery could not be had in this river?

A Are you talking about the case where Mr. Satiacum was arrested in August, I think it was?

Q No, I am just talking about the Department of Fisheries' position as to net fishing in the Puyallup River prior to those present existing, what you call special Indian regulations.

A If you were referring to testimony that had to do with a specific time, if I remember right, that was the time of that fishing was on a chinook run and, the testimony was specific to chinook, yes, if that was the case, if that is what you are referring to, I would have said no, no fishing.

Q Now, a year ago, not this year, but last year, is there any time last year when it would have been your position that there could be or should have been an Indian net fishery on the Puyallup River?

A After the hatchery run was counted, back at the hatchery, then this was the first time that we had information that it looked like we could set a fishery if we would have had in January, the information that we, I mean, if we had ahead, in July, say, the information that was available to us in January, then we might have looked at it differently, what we had to do was say we have to wait and count them, it is possible, we have got to wait and count them and actually be able to say in good faith there will be some surplus before we could set a season.

Q Didn't you testify, in setting Indian regulations, there were two things, among others, two major things that changed your mind or led to the regulations, that was the court, Supreme Court case, and also better technology?

- A Yes, overall ability to manage fish runs and produce fish runs.
- Q When are the regulations for the salmon run for commercial and sports fisheries generally set?
- A This varies. We try to set, as to the sport fishing regulations, prior to January first, because we have a number of fisheries that are going on, and set them for the new year.
- Q When were they set this year?
- A Probably, I don't remember, but probably in late November or in December.
- Q Of last year?
- A I wouldn't swear to this. That's the way I think it would be.
- Q Now, when do those regulations, when do they become effective?
- A They became effective January 1.
- (Re. 170) Q That is on all of the Washington fish this year, on all of the salmon coming into the sound?
- A You mean for the sport fishery, personal use?
- Q For both commercial and sports.
- A No, the hearing for the commercial fishery would have come in late winter or early spring.
- Q When would those regulations become effective?
- A 30 days after filing with the code reviser.
- Q Roughly when was that, do you recall?
- A What we are careful to do is have our regulations lawful before the fishery starts. That is the critical point. We usually don't have a fishery that is affected by any net fishery until late May or in June, so I haven't committed hearing dates to memory, we have a lot of them.
- Q You don't recall when they actually went in, but some time before May?
- A That would be my opinion.
- Q Could it have been as early as March?
- A As I say, I don't know.
- Q When were the special Indian regulations first proposed?



A I don't remember when they were first proposed. Are you talking about Puyallup?

Q I am talking about all of the special ones, Makah, Nisqually, Puyallup, when were they first proposed?

A I think we started on the Columbia River two years ago, three years ago.

Q Aside from the Columbia River, when were the Puget Sound—

A When they were first proposed, you mean, in what sense, we talked about setting a Puyallup regulation quite extensively during 1969, the Director declared that if the run responded favorably we would set a season, now, if that's what you mean by proposed, then it was proposed at that time.

MR. GINGERY: Your Honor, is it not the issue before us, whether or not the Department of Fisheries recognizes the Indian treaty rights and attempts in its programs to give recognition to them? I don't understand the purpose of historical inquiries.

THE COURT: Well, I suppose there were different regulations when this matter was heard before than there are now. Special regulations have come into effect, but actually I don't think this is the way to prove this. I think the regulations could be here or could be subpoenaed, and they are the best evidence without any question. This man does not purport to know all these dates.

MR. OLSON: But Mr. Lasater was the one who was one of the leading parties in all of these, Your Honor, and he should have some recollection, I think, when they were passed.

MR. GINGERY: Your Honor pointed out, we have now, in the code reviser's office, all this information.

THE COURT: Which office?

MR. GINGERY: Code reviser's office, all this information perfectly available there.

MR. OLSON: This witness is qualified to answer these questions. If he does not remember he does not remember.

(Re. 172)

THE COURT: He said he doesn't remember.

Q (by Mr. Olson) When, do you recall when the regulations became, were passed on these special Indian fisheries?

A I believe, from memory—

THE COURT: Special regulations?

MR. OLSON: The Indian regulations.

THE COURT: It is right here in evidence, I think.

MR. OLSON: I'm talking about all of the regulations for the Indians, not just the Puyallup but the Nisqually—

THE COURT: I don't think we are going into all these regulations now. In the first place, are they under different treaties?

MR. OLSON: Some are, some are not.

THE COURT: We can't go into the different treaties. We have one treaty with the Puyallup Indians we are trying to interpret, that we are trying to interpret what reasonable regulations are, or what the Department says are reasonable regulations. I have ruled before, we are just not going to go all over the State. This opens too large a door, Mr. Olson, we'll be here six months.

Q O.K., let me, isn't it a fact, that the Puyallup regulation was not passed until substantially, or a short period anyway, after the other special Indian regulations were passed?

A The Puyallup regulation was set last, I think.

Q A month or so later?

A I think, if I remember rightly, it was around a month.

(Re. 173) Q Was that one of the reasons for not passing the Puyallup regulations with the rest of them, this law suit?

A No. Well, it may have been, what I immediately thought of was the tremendous amount of testimony and ill-feeling on all sides. The case that I thought of immediately that challenged us the most was the case brought by the

sportsmen by the Department, for setting this regulation. That was one that immediately came to mind.

Q Now, are the regulations here, and the injunction in this case are aimed at fishing at usual and accustomed places on the Puyallup, for the Puyallup Tribe?

A I don't know if the words usual and accustomed are part of it. But I think, to me, you are asking me a legal question and I am not sure of just what you want. As I see the regulation, it is to prohibit the Puyallup Indians from fishing on this river contrary to State regulations. That is my understanding of it.

Q At all places, or only at usual and accustomed places?

A I just don't reach your question.

Q Where are you trying to limit the fishing by the Puyallup Tribe?

A You see, we have approached it differently. We have approached it as to how we might recognize their treaty right, whatever it might be. We have not approached it from this other side, because of the lot of confusion, conflicting views on where usual and accustomed grounds are and a number of things I don't think have been determined as yet, but we found a place where we thought we could and should recognize Indian treaty rights.

174) Q Now, you have indicated your recognition of the Indian fishing rights, one, you are giving a special, exclusive regulation, a special season, two, you have indicated the hatchery plants, I think you testified to one on the White River, is that correct?

A I mentioned one in relation to probably the Mud Mountain Dam, I think.

Q Wasn't that particular plant, because of the Bureau of Sports Fisheries & Wildlife, in trying to have a program to benefit the Muckleshoot, wasn't that actually a federal plant?

A I know there are plants made by federal people, and, in part, in arrangement with the Fisheries Department, I don't remember the particular plant, whether there was a problem, if this was part of that arrangement or not.

- Q** Why do you, why does Fisheries need an injunction in this case, in the light of your special regulations?

**MR. GINGERY:** Your Honor, the question is not, before the court, is not why the Fisheries need one, but what is to be done under the Supreme Court mandate of the one they have, which is to redraft it in a form suitable to the Supreme Court. Completely beyond the scope.

**THE COURT:** I think that is a legal question, whether an injunction is proper or whether the only remedy should be an arrest for violations.

- Q** Mr. Lasater, let us take, can you give me some estimate of the number of salmon, by species, in the Puyallup runs, how many salmon are we talking about in the river? I think you heard Mr. Millenbach say there were 10,000 steelhead come up the Puyallup. I realize pinks run every other year, there are different runs, roughly, giving each year, take two or three years, what are the runs, by species, the number of fish?

(Re. 175)

- A** I didn't bring that, such material with me, and haven't committed it to memory. I know the salmon runs are considerably larger than the steelhead runs, coho probably most abundant, on the years when there isn't a pink salmon run, pink salmon runs next, followed by chinook, then chum.

**THE COURT:** Do you have figures on that?

- A** I know that our staff has figures on the size of the salmon run.

**THE COURT:** Would you bring them with you tomorrow?

- A** Yes, I can. These will be our best estimates of run size, yes, I can bring them.
- Q** Is there any distinction between a salmon and a steelhead that makes it okay to net a salmon but not a steelhead, from a conservation standpoint?
- A** I have never pretended to be an expert on steelhead.
- Q** You have had training in fisheries, have you not?
- A** Yes.
- Q** And how about, in part of that you had some experience with steelhead, have you not?

MR. CONIFF: I object, Your Honor.

THE COURT: I am going to sustain the objection, that it is beyond the scope of the direct examination.

MR. OLSON: No further questions.

THE WITNESS: Pardon me, I want to write down for sure the material I am to bring tomorrow.

THE COURT: I understand that Mr. Olson was asking what the numbers were of salmon in the river, for particular years, chinook, coho, and, in other words, all your varieties there, chum and pink salmon.

MR. OLSON: Yes, Your Honor.

THE COURT: Is that what you asked?

MR. OLSON: I would like, I think because of the different runs, perhaps four years, showing the different amount each year, what species in the river.

THE WITNESS: May I explain that the numbers that you will get are our best estimates of the runs. We don't count every fish in the river. I think that should be quite apparent.

MR. BARER: I would like any figures you have with respect to the Puyallup River, that you have in your possession, which reflect any type of salmon runs on the Puyallup River, if you have any analysis or abstracts of the figures I would appreciate it.

MR. GINGERY: That would be a little broad.

MR. BARER: Only with respect to the Puyallup River, I don't want, and Commencement Bay.

MR. GINGERY: We are very anxious to cooperate.

THE COURT: Might I ask the witness, do you have some studies made, or—

THE WITNESS: The Department has a very large backlog over the years, of volumes of material pertaining to salmon runs in the Puyallup River, reports and accounts.

(Re. 177)

MR. BARER: I don't want raw material as such, I want the conclusory statement indicating size of runs by year since they started, I think 1935 is when they started, I think they keep those figures, don't they, Mr. Lasater, estimates of the three major types of salmon?

THE WITNESS: I am certainly not sure we have the data you want for all years.

MR. BARER: Whatever years you have, I would appreciate.

THE COURT: Before you go on, I would like to ask a question, too.

### EXAMINATION BY COURT

Q Now, you say the different runs, there is a spring run of chinook and a fall run?

A Yes.

Q What are the approximate dates they run?

A The spring chinook will tend to enter the river beginning in May, and run into the—

Q Is that around the first of May?

A Yes, early in May, I am giving you the peak periods. There are stragglers on each end.

Q May first to—

A To the end of June.

Q June 30? Then, the fall run.

A The fall run of chinook will start moving well in the last half of August, and—

Q August 15?

A Yes.

Q Or sooner?

A No, not sooner, I would put a closer date to the migration actually entering the river in numbers around the 20th instead of the 15th.

Q August 20th to what?

(Re. 178)A Will run in numbers until the, oh, mid-September, and one of the reasons for setting the 21st date for coho is that most of the chinook should have cleared the area.

Q Would you say September 15 to September 20, which do you—

A September 20.

Q I realize you can't be exact.

A September 20 is a good date.

Q These are approximate figures?

A Coho, there is, while we do not separate them into races, there is a smaller group that will enter the Puyallup in late August and early September. These are native fish. Then our hatchery run will peak.

Q That is August 20, we'll say?

A Yes, last week.

Q When?

A Through the first week or so of September. This isn't too precise, we know that this small group of fish goes through.

Q Say on September 15, not exactly, but approximately?

A Yes. The hatchery run will peak in from 21 days that we are using for a start of the fishery for a good month, actually, it will go a little longer than that, and the wild run will extend to later.

Q That would be to October 30, we will say?

A Yes.

Q Now you say there is a wild run?

A The wild run of coho will be running at this time, but the run will be of a lesser amount until late October, then it will build rapidly, starting, oh, October 20, and into the first part of November.

Q November 10 or—

179) A Yes, about that, you might as well use the November 10 date for about the start of the chum run, and they will run through the month of November, with a few fish into December.

Q December 5?

A Yes, that probably would be as good as any. The thing I would caution you, sir, that we are talking about largely about the entry of the fish into the river and passage through the lower river. Their timing in the upper



watersheds, where they are spawning, is later in each case, as you may realize.

Q What about the pink run?

A The pink run will come in almost coinciding with the fall chinook run, mid-August through September in the river, lower river, a little overlap into October.

Q What I am getting at, would those dates be the dates that these fish will clear this Puyallup Fishery, because you have set the fishery, as I understand it, above the Commencement Bay area, where you say the fish mill around, and below the spawning area you say, at approximately above Puyallup?

A They will be pretty close. The thing that we might do is, if one run is in abundance and the other run is present but hasn't built yet, then we may set a season that will still be an abundance of one and the other is present, but not of importance yet, we may set seasons based more on what peaks are of the run and the size of the overlap, that will affect our decision, as well as whether some fish of this run are actually present or not.

(Re. 180) Q Well, would we be safe to say that there is one run, spring chinook, that runs, we will say, in the months of May and June in the spring, and that the rest of these cover a period from their earliest period you gave me, which was August 20, and the latest period, we will say, December 5?

A Yes.

Q So, the runs of salmon are in existence from August 20 to December 5?

A In the lower river, in the area of the fishery, those are quite good figures.

**JAMES L. HECKMAN'S TESTIMONY**  
(Re. 328-369)

**James L. Heckman**

(Re. 328)

Called as a witness in behalf of the defendants, was duly sworn by the court, and testified as follows:

## DIRECT EXAMINATION

by Mr. Barer

Q Mr. Heckman, will you state your full name and address.  
You might spell your last name.

A James L. Heckman, H-e-c-k-m-a-n.

Q Your address?

A 2209 Northwest 115th Street, Vancouver, Washington.

Q Can you tell the court your occupation?

A Yes, I am a fishery biologist and associate regional supervisor of the Division of Fishery Services with the  
29) Bureau of Sport Fisheries and Wildlife.

THE COURT: Just a minute.

A Associate regional supervisor of the Division of Fishery Services, Bureau of Sport Fisheries and Wildlife.

Q Is that part—?

A Department of Interior.

Q Division of the United States Government?

A A division of the United States Government.

Q Now, could you explain to the court what you do in that position?

A As an associate supervisor of the Fishery Division, I assist in supervising the work of the Division, which generally is providing technical assistance in fishery management to Indians and to managers of lands owned and controlled by the United States Government.

Q How much area is under your supervision?

A This includes seven western states and, until July, included Alaska.

Q Now, what is your education, Mr. Heckman?

A I have a Bachelor's degree from the University of California.

Q In what subject?

A In zoology, with a curriculum centered on fish and wildlife management. I did not quite complete the division's activities, if you wanted them all.

Q I think you should put that into the record, Mr. Heckman. Continue, please.

A The Division, in addition to providing technical assis-

tance to the groups I mentioned, also supervises and administers the cooperative fishery unit program at six universities within the region. This is a program designed to further the development of graduate studies in fishery services and provides research and extension services.

(Re. 330)

THE COURT: For graduate studies?

A It is for graduate studies.

Q How long have you been in your present position?

A Three years.

Q What did you do before that?

A Where would you like to have me start?

Q Why don't you tell the court a little bit about your background in general.

A I graduated from California in 1952 and worked with the Bureau of Reclamation in the San Joaquin Valley of California in a research project aimed at devising a means of screening salmon, striped bass, and other anadromous species from a huge pumping plant located in the delta of the Sacramento and Joaquin. From there I moved to Portland, and worked for the Fish Commission of Oregon on Columbia River investigations which included sampling of the commercial harvest of salmon, steelhead, and other anadromous species and also included policy studies in steelhead and in tributary streams of the Columbia River. I then went to work for the Fish and Wildlife Service in Portland and worked for approximately two years on a study of the life history and duration and food habits of the squaw fish in the Columbia system. The squaw fish is a notorious predator of young salmon and steelhead, and in 1956 I transferred to the Division of the River Basin Studies of the Bureau that I now represent in northern California, where I participated in a reconnaissance of the salmon and steelhead resources of several major northern California streams, this included population studies in salmon and steelhead along with other studies, and in 1959 I moved back to Portland with the same Division of River Basin Studies and the work in that area involved the study of proposed water development projects which are licensed or constructed by the federal

(Re. 331)

government, and our work there was to determine the effects the project might have on fish resources and determine mitigative or enhancement measures that might be connected with the project. In 1962 I joined the Division of Fishery Services and opened the Olympia office which dealt with western Washington, and the primary work there was assisting Indian Tribes of western Washington in the management of their fishery resources. The bulk of the work for the most part was on the Quinault Indian Reservation, and to a lesser degree, I was the only man in the office, I moved into other areas with the Makah of Tulalip, Lummi, Swinomish, to some extent the Muckleshoots, to provide what assistance I could to them.

Q Do you belong to any societies devoted to the study of fisheries?

A I am a member of the American Fisheries Society and the Pacific Fisheries Biologists.

Q Do you serve on boards or commissions with respect to determining fishery policy?

A I am not sure what you mean, fishery policy.

Q The, I think you told me you were chairman of a White River—?

A Oh, yes, I am chairman of what is called the White River Fishery Improvement Committee, which has on it members of the Washington Department of Fisheries and Game, the Muckleshoot Tribe, Corps of Engineers, and we have been in cooperation with the Washington Department of Fisheries and Game, and the Muckleshoot Tribe, attempting to help analyze the various fishery problems on the White River.

Q Have you written reports or studies with respect to fisheries problems?

A I have written numerous reports on fishery management programs and problems.

THE COURT: What do you mean by writing a report? Is that an article?

A None of these are published, Your Honor, but these are reports of the Division authorized by myself or reviewed by myself.

Q Mr. Heckman, could you define for the court conservation?

MR. GINGERY: May I inquire on *voir dire* the expertness of the witness?

THE COURT: All right.

### VOIR DIRE EXAMINATION

by Mr. Gingery

Q Just a couple of questions, I didn't quite understand your exact role. Do you merely collect data to be used by those responsible for final management decisions, or are you, yourself, responsible for final management decisions in the management of fisheries?

MR. BARER: Unless the witness understands, I don't undersand what a final management decision is.

MR. GINGERY: I think the witness understood.

THE COURT: If you are seeking to show whether he is qualified or not—

MR. GINGERY: I am.

THE COURT: I think he is qualified as an expert. I think you can do this in cross-examination, if he is qualified as an expert, that is cross-examination.

(Re. 333)

### DIRECT EXAMINATION CONTINUED

by Mr. Barer

Q I will restate my question. Could you define for the court the term conservation?

A Conservation, as in reference to a renewable resource such as a fish population, means management to protect and enhance its natural environment, manipulate its population, to insure its perpetuation, while securing a maximum yield for harvest.

Q So, you take, the question of harvest is implicit in the term of conservation, is that correct?

A That is the way I interpret it.

Q Now, how do you determine, in fact, what a harvestable portion of the, of a particular resource is?

A Do you mean fish?

Q Yes, obviously, this is with respect to, I don't remember the exact terminology, but, you said renewable resource, I think was your terminology.

334) A Yes. You determine the harvestable supplies by determining first of all what is the production capacity of, say, a particular stream as far as salmon is concerned, determine what is necessary as a seed supply, and egg supply, a spawning escapement, and with appropriate studies determine what the overall production can be from this stream, and estimate what the surplus is in excess of that spawning escapement need.

Q Normally, then, what you, you used the term spawning escapement. Will you tell me what spawning escapement is?

A Spawning escapement is that number of fish that move upstream beyond the fisheries, to the spawning grounds.

Q And what do you do with the, is it correct to say, surplus over the spawning escapement?

A You could say this, yes, if you are referring, you may be referring to the total production above your spawning escapement requirements.

Q Would it be fair to say not only a surplus—

A Harvestable surplus.

Q What do you do with a harvestable surplus in a proper management program?

A Hopefully, you harvest them.

Q Now, were you present when Mr. Millenbach testified?

A Yes.

Q And at that time, Mr. Millenbach testified, in essence, that he did not feel that we have a steelhead net fishery on the Puyallup River consistent with conservation. Do you have an opinion as to whether or not you could have an Indian net fishery on steelhead in the Puyallup river system consistent with conservation as you describe it?

MR. CONIFF: I object, Your Honor. There certainly has been no showing on the qualifications of this witness, that he is qualified to express judgments or opinions upon steelhead manage-



(Re. 335)

ment questions, unless it can be affirmatively shown that this witness has, in fact, had such experience in his background as to fish biology, I submit a proper showing has not been made.

THE COURT: The court has ruled he may testify as an expert, but I don't think there is enough foundation to show his knowledge of the Puyallup River yet.

Q Do you have some experience in steelhead management, Mr. Heckman?

A Yes, I have.

Q Can you tell the court a little bit about your experience in that field?

A With the Fish Commission of Oregon, I participated in the steelhead population studies and in regulation hearings, regarding regulations set on steelhead harvests, and in a number of years of experience with the Quinault Indians, who have a gill-net fishery and sport fishery on steelhead in the Quinault River and Queets River, I have worked closely with them in the management of that resource.

Q What would you base your opinion on, I think that was the next question I was going to ask if he said yes, I was going to ask what would you base your opinion on with respect to the question I pose to you?

MR. CONIFF: I object, Your Honor, there is still no showing this man has been responsible, in the sense of promulgation of rules and regulations pertaining to the management of a steelhead population.

THE COURT: I think he has to show what his knowledge is of the Puyallup River.

(Re. 336) Q Would you describe to me how you would base an opinion with respect to the Puyallup River?

THE COURT: That isn't the question, the question was does he know about the Puyallup River.

Q What do you know about the Puyallup River with respect to this particular question? Have you reviewed any material respecting it?

A I have reviewed the State information on the condition of the steelhead runs in the Puyallup River, I have been



a, as I said, a member before of, a chairman of the White River Fishery Improvement Committee, and have quite good knowledge of the condition of the White River and a fair general knowledge of the remainder of the system.

THE COURT: That is a tributary of the Puyallup?

A Yes, sir.

Q You also heard Mr. Millenbach testify with respect to this?

A Yes.

Q Would you base your opinion partly on Mr. Millenbach's testimony here in court?

A Yes, I would.

MR. BARER: I restate the question, Your Honor.

MR. CONIFF: Your Honor, I continue my objection. First of all, by his own admission he is relying upon data which has been collected and developed in terms of the management or regulatory scheme as far as steelhead are concerned, by the State. This man, I infer from his own statements, he himself has collected no data concerning steelhead runs of the Puyallup system. I submit further, as I have stated before, that this witness has not testified that he himself has been in a position of management responsibility *vis a vis* the management of steelhead runs. Further, I submit that the witness, by his testimony, limited his testimony in the State of Washington to Indian reservations and areas outside of the State jurisdiction.

THE COURT: I think he can base his opinions on information assembled by the Department, if he studied it. I don't think he has to collect it himself. It might go to his prejudice or weight of the testimony. I don't know what he studied. You can *voir dire* him on what he studied if you wish.

MR. CONIFF: At this time, Your Honor?

THE COURT: Yes.

**VOIR DIRE EXAMINATION**

**by Mr. Coniff.**

**Q** With regard to the Puyallup River, well, strike that. Let me just ask you the question, Mr. Heckman, what data would you rely upon to form your opinion of the subject matter of this objection, what is the specific data? From the Quinault, for example, for example what data do you have from the Quinault steelhead runs? I would like to see it.

**A** What data do I have?

**Q** If you have any.

**A** Yes, I have information collected by the Game Department on the estimated sport catch on the Quinault River. I also have reviewed information on the commercial harvest by the Tribe, by the Quinault Tribe, and the sport harvest that is conducted.

**Q** May I see this information you are basing your opinion upon, at least in part?

**THE COURT:** I don't think we want to go into the Quinault so much. What does he know about the Puyallup River, what has he studied.

**Q** The Judge has framed the question.

**A** I have studied the runs of steelhead to the Puyallup system, the counts at Mud Mountain Dam, I have reviewed the State stocking records of the production from the State Hatchery, I have a fairly good knowledge of the condition of the habitat of the Puyallup River, and as it applies to steelhead, I am familiar with the sport harvest record.

**Q** You, basically, reviewed the data collected by the State of Washington, is that correct?

**A** I would depend heavily upon the data collected by the State Department of Game.

**Q** Is there any other source of data that you would rely upon in forming an opinion, other than data supplied by the Washington State Department of Game?

**A** If I were to have the sole management responsibility?

**Q** I am not asking you that question. I am asking you, is there any other data pertaining to the Puyallup River

steelhead runs you would rely upon in forming an opinion, other than data made available or developed by the Washington State Department of Game?

MR. BARER: You mean exclusive of his own background, raw data or his own knowledge?

MR. CONIFF: Any sort of data this man would rely upon.

MR. BARER: Besides his individual expertise and/or including his expertise?

THE COURT: That question is a little bit difficult. He says he is familiar with the habitat. I assume that is personal observation.

THE WITNESS: Over quite a good deal of it, Your Honor.

THE COURT: I think he is qualified to give an opinion. You can argue the weight of it later.

### DIRECT EXAMINATION CONTINUED

by Mr. Barer

Q I may ask you along that *voir dire*, for weight, do steelhead generally have characteristics that are the same irrespective of the river that they are in?

A Irrespective—?

Q In other words, are the patterns of behavior of steelhead, say, upon one river substantially the same generally on other rivers?

A Yes, they are.

Q And are you generally familiar with the type of net fisheries which are used by the Indians on these rivers?

A On the Puyallup River?

Q On the Puyallup River, historically, and the other rivers, say, as the reservation rivers?

A Yes.

340)Q Okay. I think the question is before you now as to whether you have an opinion whether an Indian net fishery on the Puyallup River, with respect to steelhead, is consistent with your definition of conversation?

A Yes, I feel a properly regulated net fishery by Indians,

on the Puyallup River, would be commensurate with my definition of conservation.

Q Would you explain to the court how you arrived at that?

THE COURT: This is in connection with steelhead you are talking about?

A Yes.

Q Would you explain to the court how you arrived at that opinion, and tell the court generally what the nature of the opinion is in some detail?

A Based upon the testimony that I have heard during these proceedings, I am of the opinion that a net fishery, properly regulated, can be operated on this system. I have close familiarity with the Quinault steelhead fishery, where gill-nets are used. I know the record of the sport fishery. I am familiar with the record of the commercial fishery and the general status of the Quinault River steelhead runs, and I do not feel that they have been adversely affected by this type of harvest. I am also generally familiar with the Columbia River steelhead runs and the effect of the gill-nets upon that resource.

Q In your opinion, do you have an opinion as to whether this net fishery would adversely affect the spawning escapement for steelhead on the Puyallup River?

A Would you please explain what you mean by adversely.

(Re. 341) Q What I am saying, you can still have, in your opinion, would your opinion be that you could still have spawning, an adequate spawning escapement and still have a net fishery?

A I believe if properly regulated that could secure an optimum spawning escapement, yes.

Q Now, with respect to the, what we characterized originally as a surplus when we discussed conservation, does it really matter, from a conservation standpoint, who takes the fish or how the fish are taken, to determine whether in fact who takes the fish or how they are taken, as long as there is an adequate escapement?

A I would say as to who takes them, this would not be of primary concern, how they are taken would be. There are ways in which they could be harvested that could be detrimental.

Q Would this net fishery that we are talking about be one of those things, or are you talking about, as the witness Lasater said, dynamiting?

A I was referring to this sort of thing.

Q A net fishery, in and of itself, would not be destructive?

THE COURT: Just don't lead him, now.

A If a net fishery were conducted so that it did not take any more than the desired, based on management decision, spawning escapement, and if it did not perhaps leave some of the fish in a damaged condition that would cause mortality resulting in waste, I think a net fishery is perfectly acceptable.

Q Now, have you reviewed data, essentially collected by the Department of Fisheries, with respect to other Puyallup River Fisheries besides steelhead?

A Yes, I have.

Q From this review, did you ascertain whether the escapement for the Puyallup River, with respect to spawning salmon in the past four or five years, is any different than from the average of all of the prior years for which figures are available?

THE COURT: Wait a minute, I didn't get that. Will you repeat your question, please?

Q From this review, did you ascertain whether the escapement for the Puyallup River, with respect to spawning salmon in the past four or five years, is any different from the average of all the prior years when there were figures available?

A On the basis of an average, I would say that the runs of the past escapements to the hatchery rack of the past four or five years are not grossly up or down.

Q They are about average?

A About average.

Q Now, in 1963, Mr. Lasater testified, you were present when Mr. Lasater testified, were you not?

A Yes.

Q Now, you know about the injunction that was issued in this court, which, first of all, with respect to Mr. Lasater's figures which he talked about, the 73,000, I think, fish which were harvested in 1963—

THE COURT: How many?

Q I think it was 73,000.

THE COURT: 53.

MR. BARER: No. that was for pinks.

THE COURT: I see what you mean. You mean overall.

(Re. 343) Q Overall, with respect to that, do you think that, based upon your knowledge, that those figures are accurate with respect to and show what actually was attributable to the Puyallup River system?

A As I understand, I am not sure about the exact number, 73,000, it was somewhere in that neighborhood, as I understand the testimony here, some fish destined for other streams in the lower Puget Sound were probably in Commencement Bay and very likely may have been included in the catch attributed to the Puyallup River landings.

Q In determining fish-take in Commencement Bay, do you have, as to what, are there fish now in Commencement Bay which also go to other river systems besides the Puyallup?

A There probably are at this time.

Q So, in, as a fisheries management individual, or fisheries biologist, in determining the significant take out of Commencement Bay, would it be necessary for you to examine these other systems also?

A Will you repeat that please? I am not sure I understood it.

Q May I restate it. Is it necessary, before you can arrive at a determination of the allowable portion of fish to be taken out of Commencement Bay, you study river systems other than the Puyallup?

A It would be desirable in your ultimate fishery management picture, if you could have a good knowledge of the destination of the fish that move into Commencement Bay en route to their spawning streams, and this might take considerable study over several years.

(Re. 344) Q From the statistics that you have examined, can you determine whether the Indian net fishery, as it existed in 1963, had an adverse effect upon the spawning escapement upon the Puyallup River system?



A I would say in answer to that, since I am not positive, based solely on my review of the landings recorded by the Department of Fisheries, that were attributed to the Puyallup River net fishery, I am not sure that these figures would positively tell me how many fish out of that catch could be attributed to the Puyallup River, and, therefore, a comparison of the catch with the spawning escapement might not be possible, it might not be possible to relate the landings in the river with the spawning escapement, which you would determine from the hatchery escapement, spawning ground surveys, trap counts, I am not sure that it would be possible to relate the landings with the spawning escapement without more information, and if I could not do that, it would be difficult for me to determine what the effect of landings might have been on the subesquent fish runs.

Q Did you see any clear pattern in the figures, which would indicate any relationship at all of net fishery, the net fishery to the total escapement?

A Since I am not positive about the reliability of the landing figures, and I cannot positively relate them to the escapement figures, it would be difficult for me to say positively that the Indian river fishery was adversely affecting spawning escapement.

Q There has been some testimony, in fact, that in 1963 the Department was taking, Fisheries Department was taking fish out of the Puyallup hatchery and putting them in the Nisqually. What significance do you draw from that fact, as a fisheries management expert?

345)

A Did you say in 1963?

Q In 1963. Are you aware of that?

THE COURT: You say they were taking them out of the Nisqually?

Q No, out of the Puyallup Hatchery, and putting them into the Nisqually. Are you aware of that?

A Yes, I am.

Q Can you tell the court what practical significance that you draw from that particular factor?

A As I understood from Mr. Lasater's testimony, the Department was somewhat disturbed by what they termed



an unregulated Indian fishery, and I assume this action was some sort of relaxation of their management efforts on the Puyallup fishery.

**Q** Can you explain that a little bit more by what you mean by relaxation?

**A** Well, I believe that in 1963, if I recall the record properly, they planted fewer salmon from the hatchery to the Puyallup system than they had in previous years.

**Q** What effect would that have upon the system, the population of the system?

**A** I would imagine you would expect fewer numbers of fish in the harvest and in the spawning escapement in subsequent years.

**Q** Would that put a heavier load upon the fish population in the river by doing that?

**MR. CONIFF:** I don't understand counsel's question, Your Honor.

**THE COURT:** I think he has answered it already.

(Re. 346)

It is another way of asking it.

**Q** Now, if you have a critical, a critical condition with respect to the spawning escapement of any particular type of fish, and you want to increase it, what is the fastest method of increasing the fish run or population of the fish?

**A** The fastest way that I know of, of returning the numbers of spawning fish, or increasing the numbers of spawning fish, would be to reduce the harvest.

**Q** And where does a reduction of the harvest, where does a reduction of the harvest, where do you get the maximum reduction of the harvest with respect to the Puyallup if you are, where is the maximum harvest of the fish from the Puyallup?

**A** In the commercial fisheries.

**Q** Where are they generally located?

**A** Commercial fisheries on the Puyallup stocks would probably begin in the ocean, would also be throughout the Straits of Juan de Fuca and Puget Sound, more recently, well, pardon me, I was going to say Puyallup River, but there hasn't been.

**Q** Now—

**MR. GINGERY:** Your Honor, I don't believe I heard the background for his testimony with regard to his knowledge where the maximum commercial catch is taken.

A In—

Q I think you could answer that. Do you know where the maximum catch is taken with respect to the Puyallup River Fisheries?

347) A On chinook salmon?

Q Yeah.

A On the basis of what I have read about the chinook salmon, and heard here, the greatest amount of harvest in chinook salmon would probably occur inside the Straits of Juan de Fuca, and probably within the Puget Sound area.

Q And would it be fair to say that a small reduction of that fishery has a large effect upon the fishery in the Puyallup?

A When you say fishery, I am not sure what you mean.

Q On the total number of fish going into the Puyallup.

A I would say that if it were conducted in the proper area, where the fish may be congregated or concentrated or in their migration pattern, at the right time, a small reduction in the Puget Sound commercial fishery might allow a sizable increase in the spawning escapement or the river escapement.

Q What would be the practical effect of a reduction there in where you say, in the commercial, in terms of your ability to then regulate on the river? In other words, do you have to have a more drastic regulation upon the river to accomplish this same thing that you accomplish in a commercial fishery, is that a correct statement?

A I would say, in comparison of the probable apportionment of the landings between the river fishery and the marine fishery, that a reduction in the marine fishery might allow a greater number of fish to arrive to the river, then, and if the river fishery were properly regulated, give us a better opportunity to have an optimum spawning escapement.

Q If you were going to have the optimum control of the

(Re. 348) river, considering all factors, is it better to control the river population in the river, or in the sound generally, for optimum, maximum control?

A I would assume you would want to control it in both areas.

MR. BARER: I have no further questions of this witness.

### CROSS-EXAMINATION

by Mr. Conliff:

Q Mr. Heckman, for purposes of this examination, you may assume that whenever I use the word fish, I will be referring to steelhead. Now, you made several references to steelhead, and your experiences with steelhead, and when I was inquiring on *voir dire* examination, I made reference to data for example on the Quinault that you referred to, what data or evidence do you have that the Quinault River is producing steelhead at its production potential?

MR. BARER: I object to that, I think the court has ruled on the testimony with respect—

THE COURT: You brought it in again.

MR. BARER: Okay.

THE COURT: I guess he can go ahead on it now. You opened it up.

Q Do you recall the question?

A I believe you were asking, I'm not sure, generally I assume you want to know if I am aware of whether or not the Quinault River is producing at its potential.

Q In terms of steelhead production.

A In terms of steelhead production, I am not positive that the maximum potential of the stream, or the maximum capacity of the stream has been reached, or that it is occurring now. I am generally aware of the fact that the steelhead runs in the Quinault River have not shown a material decline over a large number of years.

(Re. 349)

Q What data do you base that opinion upon?

A I base that opinion on landings, in the steelhead or the commercial fisheries for steelhead by the Quinault Indians, and by the sport fishing on the river.

- Q Can you, without unduly lengthening the record, can you produce, at a later time after the recess, I gather the court will be taking this under advisement, for the record, the data to which you referred for, let us say, a ten-year period, would this be unreasonable? Can you do that, for the record?
- A I would have to secure this, these data from the Quinault Tribe where the records are kept. I have seen some of the information.
- Q My question is, can you produce this data that you are basing your opinion upon, for the record, at a later time?
- A Yes, I could probably provide the court with records for the past four or five years.
- Q Why can't we go back beyond that?
- A I think we could go back, I think we could go back ten years ago and secure a, data for the time period preceding that when this information was collected by the Washington Department of Fisheries.
- Q Are you saying, then, that the data is only available, that you are relying upon for the past, for the past five years for the Quinault River?
- A Some data is probably available for every year.
- Q Will you produce whatever data you have that is available for the past ten years on steelhead in the Quinault River, for the record?
- A Yes.
- Q What is the production potential for steelhead in the Quinault River? What is the escapement goal there?
- A I am not actually that involved or that familiar with the escapement goal.
- Q You don't know?
- A No I don't.
- Q Then, how can you express an opinion of a set-net fishery upon steelhead runs in that river?
- A Based upon the fact that having conducted a set-net, or a set-net fishery on that resource for many many years, more than I know, the steelhead runs appear to be in a healthy condition.
- Q But you don't know how many we need for escapement there?

A Not exactly.

Q All right, I won't belabor that point. We will move now to the Puyallup River. What is the production potential for steelhead in the Puyallup River?

A I believe the figure of 6,000 was provided by another witness as the natural production potential of this system.

Q What is its production potential—pardon me—what is its total carrying capacity, including State Hatchery plants in the Puyallup River?

MR. BARER: If you know.

MR. CONIFF: Counsel—

THE COURT: Just leave him alone.

(Re. 351) A I feel that if you include the hatchery plants, the production potential would be unlimited.

Q Not limited in any way, and you are saying that as a biologist?

A I am saying that if steelhead are stocked into the Puyallup system from a hatchery, as steelhead normally are at the time of their seaward migration, all you need is water to transport them to sea.

Q You are assuming no fresh-water rearing, and the hatchery plant being the out-migration or smolt situation?

A That is correct.

Q I see. So that your question then does not present the problem of just simply environment limit for rearing area of the stream?

A Pardon me, my question?

Q Your answer, I'm sorry, your answer does not attempt to cope or deal with that problem, rearing capacity of the stream?

A I believe the Game Department has conducted some surveys and made some estimates of the escapement and rearing capacities of the Puyallup River.

Q Have you reviewed that data?

A I have reviewed some of it.

Q What is your opinion, then, as to the rearing capacity of the Puyallup River for steelhead?

A I cannot remember the exact figures or estimates made

by the Department. I know that there are some problems above Mud Mountain Dam, for instance, between the Buckley diversion dam and Mud Mountain above the Electron project, for steelhead.

Q There are some problems there?

2)A There certainly are. I am quite sure that the Department has made surveys and made estimates of the number of steelhead that could spawn in these areas that are now lost.

Q Isn't it simply that you can't answer my question, you don't recall, isn't that your answer?

A Yes.

Q You made one comment in your direct examination that was rather strange to me, at least to hear a biologist make—

THE COURT: Don't testify. Just ask questions.

Q Yes, Your Honor. In your direct examination, Mr. Heckman, you appeared to question the validity of the 1963 catch data, and you attributed very little significance to it in terms of attempting to ascertain escape-ment of fish, or its impact on escapement of fish in the Puyallup River. What other data, as a biologist, would you reply upon in attempting to get the impact of that net fishery?

A I was not analyzing the net landings of steelhead.

Q Your comments were restricted to salmon, I take it?

A Yes.

THE COURT: Wait a minute.

MR. CONIFF: My examination is limited to steelhead.

THE COURT: That is what I thought it was.

MR. CONIFF: I understood him to make that statement as applying to steelhead. He is saying that statement applies only to salmon, not steelhead.

THE COURT: What estimate are you referring to? I got lost.

MR. CONIFF: The relationship of the 1963 catch data to the escapement.



THE COURT: Oh.

Q My question was, what other data would you look at, as a biologist, to determine the impact of that net fishery upon escapement? His previous answer was limited to salmon, and did not apply to steelhead. Now, I think there is another point that needs to be clarified here. You did not mean to imply, did you, that a commercial fishery for steelhead occurs in the Strait of Juan de Fuca or Puget Sound?

A No, I did not.

Q Isn't it true, Mr. Heckman, that the only harvest of steelhead occurs in fresh water streams by hook and line under state law and regulations?

A Under state law?

Q Under state law and regulations. I take it you are generally familiar with the Game Department's regulations?

A Yes, I wasn't sure when, was I aware that harvest of steelhead only occurred in fresh water.

Q Well, let me go back. Perhaps we are covering too much ground in one question. Is there a commercial fishery for steelhead in the Straits of Juan de Fuca or northern Puget Sound?

A No.

Q Therefore, is it not correct that the only harvest or take of steelhead occurs in fresh water streams with hook and line, under Game Department law and regulation?

A There is a fishery on Whidby Island, in salt water, and I assume that is within the laws of the State Game Department.

Q A net fishery for steelhead?

(Re. 354) A A sport fishery.

Q I tried to limit my remarks to commercial gear. I'm sorry.

MR. BARER: I'm kind of lost here.

THE COURT: I think you are a little mixed up. Are any steelhead caught in salt water by sports fishermen?

THE WITNESS: Yes, Your Honor.

THE COURT: Let's get that out of the way first. In any substantial numbers?



A No, not in substantial numbers.

MR. CONIFF: I believe Mr. Millenbach similarly testified on that point. My point simply is, Your Honor, there is no legal net fishery or commercial net fishery for steelhead in the Straits of Juan de Fuca or Puget Sound, is that correct?

A There is none, to my knowledge.

Q So that we have the only harvest occurring with hook and line in fresh water streams for steelhead, is that correct?

A Essentially, yes.

Q The logical impact of your proposed Indian net fishery would be to reduce the take by sportsmen of steelhead, would it not?

A I don't believe I have proposed a net fishery.

Q Didn't you testify with regard to your opinion as to the effect of an Indian net fishery on steelhead runs?

THE COURT: I thought you were saying you could have a fishery for steelhead by net?

A That is correct, Your Honor, but I did not propose it.

55) THE COURT: I guess we are getting into a matter of semantics again.

Q My question is, would—

THE COURT: You mean, you don't recommend it, what do you mean by propose?

A If you ask me, sir, I would say yes, I would recommend it.

Q You are aware that the opinion you are expressing would be in contravention of state game laws and regulations?

MR. BARER: I will object to that question, Your Honor. I think—

MR. CONIFF: I withdraw the question, I withdraw it.

THE COURT: All right.

Q Now, let's go back, and what you have just recommended, then, is the establishment of an Indian net fishery in fresh-water streams for steelhead, is that correct?

A May I qualify this?

Q You may answer in any manner you desire.

A In the work of the Division of Fisheries Services that I represent, we work with non-Indians, we work closely with the National Park system, the military, and we have a sizable state-federal cooperative program, and with each of these agencies we provide technical assistance so that they may manage their fishery resources within their own policies. For instance, in the National Park system, they generally oppose management of a fishery for strictly sport fishing or for recreational purposes. There is also a preservation program and generally we manage or assist them under their policies. We would stock fish, for instance, in the waters of the park, small fish so that they could be considered wild if caught by sportsmen, and this is as they wish it to be conducted. In dealing with most military reservations, we have a highly concentrated sport fishery, very often, on trout, we often have to go into a catchable trout program, where we stock fish already of legal size into the waters. This is within the management policies of those groups generally. If we work with Indians, and we do to quite an extent, we try to gear the program, the management program, to their wishes. If we are over on Fort Peck in Montana, we may be planting northern pike. If we are on the Quinault Indian Reservation, we have got to help them improve their salmon and their steelhead resources so that it may satisfy their policy and their practices of commercial harvest primarily. And if we are working with the Puyallup Indians, and it is possible to participate or be of assistance in the management of the Puyallup Indian or the Puyallup River Fisheries, in behalf of the Puyallup Tribe, then we would conduct this management as they so desire.

Q Now, I think I asked you this before, I don't recall eliciting a response. Would it not be true that the catch, the sports catch would decrease in a direct ratio to the intensity of an Indian net fishery in the Puyallup River?

A That would be essentially true, if you maintain the total river escapement at its present status.

Q By the way, what federal programs are you aware of that have, what federal programs have you added to enhance the steelhead resources of the State of Washington?

(Re. 356)

**MR. BARER:** I object to that question as being beyond the scope of the direct.

**THE COURT:** What are you trying to find out? Background, or what?

**MR. CONIFF:** I believe that the witness, if permitted to answer, would answer probably that the federal government has not participated in any steelhead production or enhancement program.

**MR. BARER:** I think Mr. Millenbach testified that, in fact, that part of their budget came from federal grants.

**MR. CONIFF:** In terms of a program operated or conducted under the direct auspices of the federal government.

**MR. BARER:** I still question the relevance.

**THE COURT:** I don't know that he claimed to do anything. He says he assists Indians and national parks and military reservations, but I didn't understand that they did anything outside of that, is that correct?

**A** Yes, Your Honor, or pardon me, we do have a state cooperative program within our Bureau and this involves the raising of a large number of trout and—

**THE COURT:** You have hatcheries?

**A** We have hatcheries where we raise trout and steelhead for the State program.

**THE COURT:** You do?

**A** Yes.

**Q** (by Mr. Coniff) Where are they located?

**A** Where are they located?

**Q** Yes.

**A** We have one located at Hood Canal at Quilcene, we have one located at Entiat, at Winthrop, we have Eagle Creek Hatchery, which happens to be on an Oregon stream, but which provides steelhead to the Columbia River I assume are harvested by Washington residents, a number of them, I am not sure I have named them all to you.

**Q** All these hatcheries you refer to are steelhead hatcheries?

A Some of them raise steelhead.

Q Not all of them raise steelhead?

A No, not all of them raise steelhead.

Q Isn't it a fact, if you wanted to compare production of these hatcheries you have mentioned, and contrast salmon to steelhead, steelhead would probably come out something like less than 5%?

MR. BARER: I object to the relevance of this line of inquiry. The relation of the United States Government and State of Washington with respect to the allocable amount of money they spend, or—

MR. CONIFF: I think I have pursued it far enough.

THE COURT: I think you have, too.

Q Do you recall Mr. Millenbach's testimony relating to the relative value of a steelhead on the commercial market as opposed to its value when taken as a sport caught fish?

MR. BARER: Your Honor, I think that is beyond the scope of the direct examination.

MR. CONIFF: He relied upon Mr. Millenbach's data, everything he relied upon was Game Department data.

THE COURT: I think he has a right to ask if the basis of his opinion, I didn't understand that he was necessarily advocating fisheries just for Indians.

(Re. 359)

MR. CONIFF: I'm sorry if I don't understand you.

THE COURT: Well, he said that, I understood that he is representing different types of people, people on military reservations and people who fish in national parks and so on, and I did not understand him to say that he was necessarily advocating the preponderance of fishing on behalf of Indians. Is that correct?

A That is correct, Your Honor.

Q Do you recall Mr. Millenbach's testimony on that point?

A On the value of steelheads?

Q Yes.

A Yes I do.

Q Would you generally concur in it or do you concur with it?

A I have not examined the information that Mr. Millenbach examined to come up with the figures that he gave in testimony.

Q Would that seem generally in the ball park, as far as you know?

A It seemed a little high on the basis of information I have seen before.

Q Which seemed high? The commercial seemed high or the sport value seemed high?

A Depending on the time of year, the location of the catch, 38¢ may be a little bit low for steelhead in good condition.

Q It might be worth maybe 45¢, 50¢, first sale price?

A First wholesale value?

360)Q Yeah.

A Not exactly sure, what the current prices are on steelhead.

Q Instead of roughly \$1.60 a fish, it might go up as high as \$2.25 a fish?

A Well, I am familiar with the Quinault's operation that where they harvest steelhead in the Quinault, pack them in ice and ship them by air to Chicago, New York, London, and receive in excess of 85¢ a pound.

Q Is that a delivered price?

A That is the price FOB Sea-Tac.

Q That includes, then, the cost of the transportation, packing, and transportation to Sea-Tac, which would be included, then, in that price?

A Yes.

Q I think I have pursued that long enough. Just so we don't, I think I have covered all the points, I just want to make sure that you understand that I will expect you, then, to provide the court, for the record, with the Quinault data that I asked you for earlier.

A Yes.

**THE COURT:** Before you go into your cross-examination, sir, I think we will have the afternoon recess.

## **AFTERNOON RECESS**

### **CROSS-EXAMINATION**

**(Re. 361)by Mr. Gingery**

**MR. GINGERY:** Your Honor, I will be brief.

**THE COURT:** The man you have to fight with is this gentleman over here. He wants to get off Monday. As far as I am concerned, go ahead.

**MR. BARER:** I think there was one thing Mr. Heckman was reminded of with respect to records we wanted to—

**MR. HECKMAN:** Yes, Your Honor, Mr. Coniff requested I bring information on the steelhead runs and/or landings in the Quinault River system, and I was reminded at the recess that a complete set of records may not be available because the Quinault tribal office, where the records were kept, burned a year ago completely, but I should be able to provide you—

**MR. CONIFF:** I would appreciate whatever data you did review in preparing your testimony today.

**MR. HECKMAN:** All right.

**Q** Mr. Heckman, you testified that you know the condition of the Puyallup River as it relates to the steelhead. Do you make the same statement as it relates to salmon?

**A** I would say yes.

**Q** Do you also say that the flow of the river has some relationship to salmon spawning activities?

**A** Yes, it does.

**Q** Do you know the average flow of the Puyallup River expressed in cubic feet per second?

**(Re. 362)A** I have a general knowledge of the White River.

**Q** No, the Puyallup, sir.

**A** No, I don't have specific figures on the Puyallup.



Q Mr. Lasater testified as to the 1969 status of wild stock in certain spawning index areas. Have you gathered any information yourself concerning the salmon spawning on Clear Creek?

A No, I haven't.

Q Kings Creek?

A No.

Q You testified that a small reduction inside the Straits can have a great effect on fishing in southern Puget Sound, and you added, if it is properly regulated at the right place and the right time. Now, do you know the migration pattern of fish, of the salmon, by species, of the Puyallup River salmon, by species, so that we may base upon that statement a judgment with regard to the place and the time? Can you describe to us the migration patterns of the various species of fish?

A No, I cannot.

Q Sir, can over-escapement cause deleterious effects in the spawning areas?

A Yes, it can.

Q Would a large closure of northern Puget Sound cause over-escapement?

A Do you mean a large closure of the—

Q Commercial.

A Commercial fishery in Puget Sound?

Q Could it cause over-escapement to streams in southern Puget Sound?

363) A Under present conditions, it possibly could.

THE COURT: What kind of restriction were you talking about? A total restriction, or—

MR. GINGERY: Just a large restriction, I could say a total restriction if that would make it clearer in the record.

THE COURT: I just would like a little more definite question.

MR. GINGERY: I believe I said a very large—

THE COURT: All right.

Q Do you wish to say something?



A I would be, I am not sure that that is a completely satisfactory answer, perhaps, for your question.

Q It satisfies me.

MR. BARER: If he wants to explain it, I think he has the right to explain his answer, doesn't he, Your Honor?

MR. GINGERY: I am not denying him any rights.

THE COURT: Yes, he can explain it then.

A I am aware that on most of the major tributaries to southern Puget Sound, there are fisheries of good size, at least there are Indians—

Q On all the streams?

A —with interest in exercising their fishing right on a good number of the major tributaries.

Q I don't believe that is responsive. Is that part of the explanation of whether or not a large—

(Re. 364) A I was merely going to explain that if there were a reduction in the commercial fishery in the upper Sound area, this would allow greater numbers to come down into the lower Sound, and they could be intercepted in the fisheries by the Indians when there are a number of hatcheries and fish facilities located on the streams of southern Puget Sound, that programs could accommodate over-escapement.

Q Do you now wish to—

A It is possible, yes.

Q You don't want to change your statement that over-escapement can be deleterious?

A That is correct.

Q Even if all the fisheries in the north were closed entirely, could the Puyallup River salmon runs still be over-fished?

A Assuming that there were not proper regulations upon the river fishery, yes.

Q Turning now to Commencement Bay, you testified to the presence there of salmon bound for other streams. What percentage of the chinook milling there are bound for other streams?

A I believe I was repeating Mr. Lasater's testimony that there were fish in Commencement Bay destined for other streams, and I don't know the percentage.

Q Of chinook?

A No.

Q Coho?

A No.

Q Chums?

A No.

Q Pinks?

A No.

MR. GINGERY: No more questions.

365)

### EXAMINATION BY THE COURT

Q I have a couple of questions. I think I want to look back at my notes. You talk about this restriction, do you know what proportion of that large flow of salmon that comes from the Straits goes into the Puyallup?

A No, sir, I don't know. I couldn't cite you a figure.

Q Would you advocate restricting that flow of that commercial fishing up there farther north?

A Your Honor, if it would be possible to restrict a portion of that fishing to protect a run of salmon destined for one of the major southern Puget Sound streams in jeopardy, where the spawning escapement was much below that desired by the managing agent, I would advocate a reduction in the Puget Sound Fisheries.

Q You pretty well have to know the condition in all of the river, though, that are fed, to know that, wouldn't you?

A Yes, you would. I believe there probably is information in the Department of Fisheries' records of the relative runs of the, to the various major tributaries.

Q You said you could have a fishery in the Puyallup, a net fishery, if it were conducted right and did not leave fish damaged. Were you referring to something like dynamiting, or types of nets and—

A I think that the gear, specifically gill-nets, should be sized so that it will, if it is intended to capture the run

of fish, it will be sized so that it will catch and keep most of those fish that become entangled in it. You would want to avoid a condition where you might have a large number of fish going through improperly sized nets, possibly, and escaping, which might cause some mortality. I am not implying that this would be a general situation.

(Re. 366)

Q Now, you said something about the escapement in the last five years. There is no difference from the average. It was my understanding from the testimony here, that there has been practically no fishing in the river the last five years.

A That is as I understand the question.

Q So that it is not very meaningful, then, is it?

A That the escapement is about average?

Q Yes. That would not really mean much, if there is no fishery?

A Sir, there is a fishery on that stock at Puget Sound.

Q In Puget Sound, yes, but not on the river.

A No sir, not in the past few years.

Q What we are trying to consider is the effect of the Indian fishery.

A Yes. I think we, most fishery agencies on the coast, generally conclude that the bulk of the harvest of chinook and coho salmon is done in the marine environment.

Q The bulk of the fishing?

A The bulk of the harvest.

Q Harvest, that is what I mean. Do you have anything to propose as to what might be reasonable regulations?

A I am not sure, Your Honor, that it is my position, as a biologist, or my place.

Q You used the term "reasonable regulations", I just wondered what you meant by that. Do you mean closures or partial, or—

A Regulations of a net fishery in the Puyallup River you mean?

(Re. 367)Q Yes.

A I believe that in order to be able to set specific regulations for a net fishery, considerable review of the existing data and additional studies would be necessary before

you could set down a good set of regulations which, might take some time.

Q Require study and data?

A Yes, sir.

Q That, of course, involves somebody working on it?

A That is correct, probably it would involve a team of biologists to study the population of the fish.

THE COURT: I have no other questions.

MR. CONIFF: Nothing further.

MR. GINGERY: We have nothing.

THE COURT: That is all, you may step down.

MR. OLSON: On behalf of the people I represent, we have nothing further.

MR. BARER: On behalf of the people I represent we have nothing further.

THE COURT: Where is Mr. Sennhauser? He seems to have disappeared.

THE COURT: Do you want these figures on the Quinault? Who was it, you asked for them?

MR. CONIFF: Yes, Your Honor, but I believe the witness said there would be some problems. He was not sure how many would be available because of the fire.

THE COURT: It seems to me there is another problem also about an Indian reservation and the conditions are not comparable, perhaps conditions of the river are but the fisheries and the planting, and so forth, do not seem to me to be comparable.

368) MR. CONIFF: I believe, if I recall correctly, Mr. Heckman stated, correct me if I am wrong, you did base, in part, the opinions you expressed on the Quinault River experience data, I thought it might be important for the record.

THE COURT: He said he had studied the Quinault and the Columbia, and so forth, northern California, I believe.

MR. CONIFF: I merely requested the Quinault. That's all I thought might be important to the record, to have this information.

THE COURT: Unless it was really going to show us something, I did not want to put him to all that trouble.

MR. CONIFF: I think you are asking me to withdraw my request.

THE COURT: If you really think it is important, why, all right, but—

MR. CONIFF: Perhaps if I could confer with Mr. Heckman and his attorney very briefly on what is available. Your Honor, we might be able to reserve this problem, particularly in light of the fire, by having Mr. Heckman, if there is no objection from other counsel, resume the stand for the limited purpose of recalling the estimates or making estimates of the catches, for a few minutes, if that is possible. Mr. Heckman has stated he believes he can do this.  
(Mr. Heckman resumes the witness stand)

### CROSS EXAMINATION CONTINUED

by Mr. Coniff:

Q Mr. Heckman, can you, are you able to, from memory, at least the estimates of Quinault Indian catch of steelhead on the Quinault River, for the past few years?

A I cannot for the past few years.

(Re. 369)Q Whatever you can recall, just for the record.

A I can only recall 1969.

Q All right.

A And these are round figures, and I could not swear to their exact numbers, but—

Q I understand, it is an estimate.

A But I would say in the commercial landing at Tahola, primarily, Tahola there were about 4,000 steelhead landed, I believe they had a value of nearly \$232,000, 4,000 landed in the gill-net fishery.

THE COURT: The value would be FOB Sea-Tac?

A Yes, and in the sport fishery on the Quinault, within the reservation, there, they had a situation where anglers are invited in, and they must be guided by Quinault Indians in their fishery through that part of the river, there was a landing in 1969; the 1969 season, which lops over into '70, about 3,000 fish were landed in the sport fishery and this does amount to a considerable amount of money.

Q Could you compare this production level to the preceding four or five years, just roughly, without going into, roughly, is it about the same?

A I believe that it is holding up about the same.

Q So that these estimates that you are recalling would probably be roughly the same level of fishery there in preceding years, is that your testimony?

A. Yes.

Q That's all, Your Honor.

### REMARKS BY THE COURT

(Re. 438-442)

38) THE COURT: I wish to state that this court spent considerable time reviewing the decisions of the United States Supreme Court and the State Supreme Court, and other cases that have occurred in the past, or opinions brought up by other courts. I came to the conclusion that the United States Supreme Court had not changed the State Supreme Court's opinion, because the United States Supreme Court simply affirmed the State Court's opinion. Now, we started out with the basic premise that this court could not make regulations, and in this court's opinion, that is the function of one of the departments, Fisheries or Game, in respect to their respective jurisdictions, and I think the opinion that I gave clearly pointed that out. We have the strange position here of the Department of Game not recognizing any special interests of the Indians, while the Department of Fisheries has now, by its regulation, recognized special interests, and, in fact, the Department of Game would like to have this court tell the Department of Fisheries it had no business making this regulation. So, at least the Department of Fisheries apparently have the opinion that the Supreme Court did recognize special rights in the Indians. I think this court in its opinion pointed out the portion of the State Supreme Court's opinion which seems to hold just exactly that, and I will read it. "The members of the tribes signatory to the various treaties do have certain special fishing rights thereunder, notwithstanding the contention of the State. And the members of such tribes are subject at least to regulations which are necessary for the preservation of the fishery, not-



withstanding their contentions to the contrary." That just about spells out this whole case. It may have been, had this problem come to this court originally, this court might have decided it differently, but as far as this court can see, it is bound absolutely by the opinion of the State Supreme Court and the Supreme Court of the United States. Actually, there is nothing in this opinion which is contrary to the position of the Department of Fisheries, except this matter of injunction. The court recognized the right of the Departments to make regulations for fish conservation, and recognized the right of the Department to exclusively make those regulations. There was some argument here during the trial that the Indians should have a hand in making regulations. The court did not recognize that. Actually, as I just stated, I would say that the Department of Fisheries entirely gained its position except for the injunction. We must bear in mind that during the pendency of this action, the Department of Fisheries changed its position. When this case went up to the United States Supreme Court, the Department of Fisheries had not conceded any special rights in the Indians, as far as I know. Now, the Department of Game is still adamant in saying that the Indians have no special rights, and I certainly, in my opinion, recognize why people, why sportsmen feel that way, because the Department of Game is supported by money from licenses. It gets no money out of (Re. 440) the general fund, as far as I know. But, as far as this court can see, that is all water over the dam. I have no right to change the basic holdings of the State Supreme Court and the United States Supreme Court. Now, just what is this court going to enjoin? That becomes a problem. Suppose this court tried to enjoin the Indians? Are we going to say all regulations? Let me point out, also, that the Departments in this hearing here on remand, chose to put in additional testimony. Their biologists were brought here and they have testified. It seems from the testimony that there is a large run of coho salmon this year, for example, something rather unexpected. I contemplate, personally, that the Department of Fisheries will probably make different regulations in different years, according to the needs. In fact, that was one of the premises that was presented by the Department of Fisheries. If there is a big run, maybe there will be different regulations from the situation when there is a very restricted



run. I don't think that the Department of Fisheries intends that the present regulation is not to be changed at all. I don't think the Department of Fisheries would want that interpretation. Now, this injunction, as the court pointed out in its opinion, was approved by the State Supreme Court at a time when, and I pointed this out also, at a time when the rights of the Indians had not yet been clearly spelled out, and the Supreme Court apparently took the position that there was no need to subject the Indians to a great many criminal prosecutions during the time that the courts were deciding what their rights were. Well, as it appears now, the court had decided what their rights are, so I, as a judge, could not see any reason that it was necessary to have an injunction, when the Department has adequate remedies.

441) Now, the Department of Game is still adamant in its position that the Indians have no special rights, and I realize they are probably under a lot of pressure from the sportsmen, and I can understand the sportsmen's position very clearly, but all this court held was that it is up to the Department to now go ahead and establish a regulation, but this court has no training in biology except a very limited basic course. It is up to the Department biologists and administrators, its experts, to decide on what is necessary. I think the Game Department has done a splendid job in building up the run of steelhead in the Puyallup River. That is indicated by the fact that the testimony here showed that ordinarily the run was about 5,000, or take was about 5,000 a year I think, in catch, where it had been increased to a take of 12 to 18,000, although it was somewhat depleted last year. It seems to the court that we have arrived at the proper solution, although I don't know whether this will ever be ended. The court, in its findings, pointed out what the respective rights were, and that has been incorporated in some of the proposed findings of fact and conclusions of law, and I think this opinion was written clearly enough so nobody misunderstood what it meant. The court did not attempt to cover up anything, it just stated right out, I think in clear language, maybe if the Supreme Courts had used a little clearer language you would not have had this problem, anyway, we did say here first, the Indians do have some special rights granted by the Treaty of Medicine Creek. I have just enlarged that, and said I think that is already held by the

Supreme Court of this State and affirmed by the Supreme Court of the United States. This court has no more rights in that field. Second, the Department of Game and the Department of Fisheries have the exclusive right to (Re. 442) make reasonable and necessary regulations for the conservation of the fish. Third, the burden of proving that an Indian is an enrolled member of the Puyallup Tribe is upon the Indian. I don't know, I think there are going to be some difficulties; the Indians haven't surmounted that situation, but that, I think, is what the court held, too. Fourth, the burden of proving that the regulations are reasonable and necessary is upon the Departments, and I think that is the holding of the court, and I think that's all there is to it. Now, we were not trying the whole legal situation over again. I think Mr. Barer is right when he says the argument is no longer an open argument. For that reason, the court would deny these motions to reconsider. I think I have carefully considered it already. I have tried to read these opinions to the best of my ability. I have concluded that the opinion meant certain things. I am frank to say, if someone thinks those opinions mean something else, they will have to take the case back up to the Supreme Court and let the Supreme Court explain what they did mean. But that is my opinion of what they meant. Now, back to this idea of the State rights as against treaty rights. The courts have repeatedly held that treaty rights are superior to the Constitution of the State or the statutes of the State, and the treaty having been made prior to the time that Washington became a state, the treaty right is superior. I don't think there is much question on that legal proposition, so, as I say, the court is going to deny the motions to reconsider, and we will now take up the question of the findings and the judgment.

### CONCLUSION

The foregoing Appendix is respectfully submitted in compliance with the rules of this Court.

Dated this 3rd day of May, 1973.

JOSEPH L. CONIFF, JR.  
*Assistant Attorney General*  
 Counsel of Record for the  
 Washington Department of  
 Game, Appellant.

**Supreme Court of the United States**

**No. 72-491 ---October Term 19**

**Department of Game of the State of  
Washington,**

**Petitioner,**

**v.**

**The Peyellup Tribe, Inc., et al.**

**Order allowing certiorari. Filed March 19 -----, 19 73.**

*The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted. The case is consolidated with No. 72-746 and a total of one hour is allotted for oral argument.*

**Supreme Court of the United States**

**No. 72-746 ---, October Term, 19**

**Puyallup Tribe,**

**Petitioner,**

**v.**

**Department of Game of the State of  
Washington**

**Order allowing certiorari. Filed March 19 -----, 19 73.**

*The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted. The case is consolidated with No. 72-481 and a total of one hour is allotted for oral argument.*

IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

---

October Term, 1972

No. ....

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DEPARTMENT OF GAME OF THE  
STATE OF WASHINGTON,

*Petitioner,*

v.

THE PUYALLUP TRIBE, INC., ET. AL.,

*Respondents.*

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PETITION FOR A WRIT OF CERTIORARI  
TO THE  
WASHINGTON STATE SUPREME COURT

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IN THE  
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No. ....

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DEPARTMENT OF GAME OF THE  
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THE PUYALLUP TRIBE, INC., ET. AL.,

*Respondents.*

---

PETITION FOR A WRIT OF CERTIORARI  
TO THE  
WASHINGTON STATE SUPREME COURT

---

The petitioner Department of Game of the State of Washington respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Washington State Supreme Court entered in this proceeding on May 4, 1972, which became final on June 23, 1972.

## OPINIONS BELOW

This proceeding originated in the Superior Court for Pierce County, Washington, in 1963 and involved an appeal from the superior court judgment which was entered August 13, 1965. The first state supreme court opinion was rendered on January 12, 1967, *The Department of Game, et. al. v. The Puyallup Tribe, Inc., et al.*, 70 Wn.2d 245, 422 P.2d 754 (1967). This Court granted certiorari and issued its opinion. *Puyallup Tribe, Inc., et. al. v. Department of Game, et. al.*, 391 U.S. 392, 20 L.Ed.2d 689, 88 S.Ct. 1725 (1968). Thereafter, upon remand, additional proceedings were held in the Pierce County Superior Court, and its judgment was entered on December 30, 1970. Appeal was thereafter taken to the Supreme Court of the State of Washington which issued its opinion on the remand questions on May 4, 1972. 80 Wn.2d 561. Petitions for rehearing were filed and were denied by the Supreme Court of the State of Washington which issued its remittitur making its opinion the final judgment of that court in the above-entitled case on June 23, 1972.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). The constitutional

validity of the conservation statute<sup>1</sup> adopted by the State of Washington which prohibits the taking of steelhead trout, a game fish, for commercial purposes with commercial gear, i.e., nylon monofilament nets, are challenged by respondents as allegedly impinging upon treaty rights secured to respondent Indians by virtue of the *Treaty of Medicine Creek*, 10 Stat. 1132.

The remand opinion below presents a question of public importance involving an interpretation of the *Treaty of Medicine Creek*, *supra*, which was left unanswered by this Court in its original opinion. *Puyallup Tribe v. Department of Game*, 391 U.S. 392 at pp. 401-403.

### QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of the State of Washington, in the opinion below, properly resolved the question left unanswered by this Court in *Puyallup Tribe v. Department of Game*, 391 U.S. 392 at pp. 401-403?

2. Whether the *Treaty of Medicine Creek*, 10 Stat. 1132, secures to respondent Indian rights, privileges, or immunities from the application of otherwise valid state conservation statutes and regulations prohibiting the commercial taking of and dealing in game fish in off-reservation waters?

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<sup>1</sup>Revised Code of Washington 77.16.060

## CONSTITUTIONAL TREATY AND STATUTORY PROVISIONS INVOLVED

### United States Constitution, Article VI:

"... This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

### Treaty of Medicine Creek, 10 Stat. 1132:

"... Art. III — The right of taking fish at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter."

### Revised Code of Washington 77.16.060:

"... It shall be unlawful to lay, set or use a net capable of taking game fish in any waters of this state except as permitted by regulation of the department of fisheries: Provided, That persons may use small landing nets or under written permit issued by the director may use nets or seines in the taking of nongame fish.

Any person violating any of the provisions of this section is guilty of a gross misdemeanor. . ."

Revised Code of Washington 77.08.020:

" . . . As used in this title or in any rule or regulation of the commission, 'game fish' include . . . *Salmo gairdnerii* commonly known as steelhead. . . "

## STATEMENT OF CASE

A summary of this case preceding and including the remand proceedings in the Pierce County Superior Court is found in the opinion below (copy attached as Appendix A) pp. 562-568.

## REASONS FOR GRANTING WRIT

1. THE OPINION BELOW DOES NOT COM-  
PORT WITH THE OPINION OF THIS COURT  
IN *DEPARTMENT OF GAME V. PUYALLUP  
TRIBE, INC., ET. AL.*, 391 U.S. 392 (1968).

This Court stated in *Puyallup Tribe v. Depart-  
ment of Game, supra*, at pp. 401-403:

Whether the prohibition of the use of set nets in these fresh waters was a "reasonable and necessary" (70 Wash. 2d, at 261, 422 P. 2d, at 764) conservation measure was left for determination by the trial court when the Supreme Court, deeming the injunction in No. 247 too broad, remanded the case for further findings. When the case was argued here, much was said about the *pros* and the *cons* of that issue. Since the state court has given us no authoritative answer to the question, we leave it unanswered and only add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase "in common with." Affirmed. (foot-  
notes omitted)

This Court deferred the question left unanswered to resolution by the state courts. The question left unanswered is whether the state law prohibiting the use of commercial set nets for the taking of game fish by Indians claiming rights under Article III of the *Treaty of Medicine Creek* was reasonable and necessary for the conservation of the steelhead trout resource of the State of Washington. In the opinion below, the state court has definitively answered that question in a manner which, it is submitted, does not give recognition to the issue of equal protection implicit in the phrase "in common with the citizens of the territory" found in Article III of the *Treaty of Medicine Creek, supra*. In the opinion below, the court held that it was incumbent upon the Washington Department of Fisheries as well as the Washington Department of Game to provide for a special "Indian only" commercial net fishery in the off-reservation waters of the Puyallup River for steelhead trout and salmon. 80 Wn.2d at 571. The failure of the court, in the opinion below, to hold that state conservation laws may be applied to Indian and non-Indian citizens on an equal basis in off-reservation waters violated the Equal Protection Clause adverted to by Justice Douglas in expressing the view for a unanimous Court in the Puyallup opinion at p. 403. As pointed out in the dissent in the opinion below:

Hale, J. (dissenting)—There is, I perceive, a curious aura of romantic whimsy suffusing the law of Indian treaties. Indian treaty cases

seem never quite fully to depart that peculiar genre of elemental melodrama compounded more of fantasy than fact, more of folklore than truth—all subject to the inevitable distortion of time and history—in order to reach a devoutly wished judicial consummation. Although this may make for good reading, it probably produces bad law. Inexorably inhering in these decisions on Indian treaties, I think, is the judicial conscience which aspires somehow to right what the courts think to be historical wrongs—even if the treaty is somehow twisted out of shape to achieve it. Thus, in Indian treaty law, the Indian occupies a traditionally exalted position; the pioneers and the government which encouraged them to settle and develop this Western frontier a correspondingly low one; and the treaties undergo an inevitable distortion in the process. The time must eventually come, however, when the courts will have to construe the Indian treaties as the parties intended and as common sense dictates. Whatever pangs of conscience the judiciary may have developed through the present century concerning treatment of the Indians more than a century ago at the hands of the citizenry, misconstruing the treaties is a poor means of expiation. Two wrongs do not make a right and the courts cannot and ought not remedy such wrongs whether real or imagined by revising the treaties and inventing special rights in order to come up with a result which comports with the judiciary's ideas *ex post facto* of what the treaty should have said. If the treaties with the Indians did not afford treaty Indians exclusive rights or preferential privilege in the state's lakes, rivers, streams and bays, the courts ought not accord such preferential rights and privileges to their descendants.



Courts must accept the treaties as written and cannot alter or amend them. *Kansas or Kaw Tribe of Indians v. United States*, 80 Ct. Cl. 264 (1934), *cert. denied*, 296 U.S. 577, 80 L. Ed. 408, 56 S. Ct. 88 (1935); *Osage Tribe of Indians v. United States* 66 Ct. Cl. 64 (1928), *appeal dismissed* and *cert. denied*, *Osage Indians v. United States*, 279 U.S. 811, 73 L. Ed. 971, 49 S. Ct. 251 (1929). If a treaty did not give the Indians special times and places in which to fish, the court is without power to write a new treaty giving their descendants such special privileges. Whatever rights Indians may once have possessed to treat with the United States as contracting entity ended with the act of March 3, 1871, Rev. Stat. § 2079, 25 U.S.C. § 71, which abrogated the treaty-making power with the Indian nations and tribes.

Lacking the constitutional power to make treaties of any kind, the courts are equally without power to rewrite them from time to time or at all—even to achieve what the courts believe to be a good result. The judicial function is limited, I think, to enforcing and upholding the treaties according to their content and spirit. Accordingly, judicial process is not the medium nor is the courthouse the place to rectify the wrong, real or illusory, done to the Indians by the pioneers and the United States government more than a century ago. Any wrongs done the Indians, if genuine and shown to persist down through the generations, should be righted by the Congress.

Historically, the concept of equal protection has meant equal application of the laws to all citizens regardless of race, creed, color, or national origin. The opinion below construes Article III of the *Treaty*

of *Medicine Creek* in such a manner as to secure to members of the Puyallup Tribe of Indians sovereign rights paramount to those possessed by other citizens of the State of Washington and of the United States. The fundamental principle of equality of treatment under the law has been subverted and intelligent management of these valuable natural resources, which belong to all the people, has been placed in jeopardy.<sup>2</sup>

As this Court observed:

"The overriding police power of the state, expressed in nondiscriminatory measures for conserving fish resources, is preserved." 391 U.S. at 399.

There is no discrimination in the application of Washington's conservation laws and regulations to all citizens. In the opinion below, the court has improperly assumed that discrimination must occur against non-Indians in order to satisfy what the lower court conceives to be the requirements of Article III of the *Treaty of Medicine Creek*, *supra*. Such a proposition is constitutionally unsound and should not be permitted to stand.

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<sup>2</sup>The proposition that the state owns all fish and wildlife, until lawfully reduced to possession, has been long recognized as the *parents patriae* doctrine. *Geer v. Connecticut*, 161 U.S. 519, 40 L.Ed. 793, 16 S.Ct. 600 (1896). This Court has previously affirmed the power of the state to apply its conservation laws to off-reservation fishing and hunting activities on an equal basis with all other citizens. *Tulee v. Washington*, 315 U.S. 681, 86 L.Ed. 1115, 62 S.Ct. 862 (1942); *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916); *Ward v. Race Horse*, 163 U.S. 504 (1896).

## 2. THE OPINION BELOW CONFLICTS WITH PRIOR DECISIONS OF THE WASHINGTON STATE SUPREME COURT.

The opinion below is in conflict with prior decisions<sup>3</sup> of the Supreme Court of the State of Washington and did not meet the requirements of this Court's opinion in *Department of Game v. Puyallup Tribe, Inc., et al., supra*. The Washington State Supreme Court in its opinion entitled *State v. Moses*, 79 Wn.2d 104 (1971) held that total prohibition of net fishing for game fish (steelhead trout) on the Green River was a reasonable and necessary regulation for the conservation of the state-owned fishery resource. The opinion below did not discuss the *Moses* opinion, *supra*. There is a direct conflict between the *Moses* opinion and the opinion below regarding the power of the state to totally prohibit the use of commercial netting gear for the commercial taking of steelhead trout which have been designated a game fish under the laws of the State of Washington. *Moses* holds that the state may totally ban commercial netting for game fish while the opinion below holds that the state must permit such fishing activities.

The opinion below appears to follow a recent decision of the Federal District Court of the State

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<sup>3</sup>*State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963); *Department of Game v. Puyallup Tribe*, 70 Wn.2d 245, 422 P.2d 754 (1967); *State v. Moses*, 70 Wn.2d 282, 422 P.2d 775 (1967); *State v. James*, 72 Wn.2d 746, 435 P.2d 521 (1967).

of Oregon entitled *Sohappy v. Smith*, 302 F.Supp. 899 (D.C. Ore. 1969). This lower federal court decision held that the State of Oregon must deal with the subject of off-reservation Indian fishing as a matter separate and distinct from its overall regulatory scheme for the management of anadromous fish including salmon and steelhead trout. The Oregon opinion indicates that the State of Oregon must allocate and guarantee to treaty Indians claiming rights in off-reservation waters a "fair share" of all anadromous fish resources prior to the application of state conservation laws to Indian commercial fishing activities.<sup>4</sup>

The opinion below denies the state the right to apply its laws equally to all citizens in off-reservation waters.

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<sup>4</sup>The Federal Court in Oregon has assumed jurisdiction over fishing in the Columbia River in *Sohappy v. Smith*, *supra*. By virtue of the Columbia River Compact, 40 Stat. 515, both Washington and Oregon must concurrently exercise jurisdiction over fishing activities in the Columbia River. Washington was not a party to *Sohappy v. Smith*. Therefore, the question of how claimed Indian treaty commercial fishing rights must be dealt with on the Columbia River is in conflict. Oregon takes the position that it must authorize special "Indian only" commercial fishing seasons in the Columbia River. The Washington Supreme Court, in *State v. Moses*, *supra*, takes a contrary view.

## CONCLUSION

The dissent to the opinion below sums up the reasons why this Court should issue a writ of certiorari to the judgment and opinion of the Washington State Supreme Court and review this matter:

There is yet another reason why the treaties cannot be read to award off-reservation fishing rights to the descendants of the tribal signatories so as to give off-reservation rights not to be held or exercised in common by all other citizens. In 1868, long after these treaties were signed, the Fourteenth Amendment was adopted to prohibit the perpetration of political inequality. It expressly provides that 'No state shall make *or enforce* any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.' (*Italics mine.*) Presumably no class of citizens is to be excluded from its protection because of race, color, creed or national origin. For the purpose of this case, all of the claimant Indians in this case should be deemed citizens of the United States and of the State of Washington. The court now reads the Treaty of Medicine Creek so as to abridge the privileges of all citizens other than descendants of the Puyallups by giving the latter the privilege of taking fish from the Puyallup River and at the same time denying to all other citizens of the state and the United States the equal protection of the laws to do the same thing. It will give to the descendants of the Puyallups special open seasons with special commercial gear, neither of which privilege is open to all others. The opinion thus not only violates the plain language of the treaty by granting to

Indian citizens rights to fish not enjoyed in common by all other citizens of the state and nation, but also contravenes the express language and violates the spirit of the Fourteenth Amendment.

Respectfully submitted:

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September 20, 1972

[No. 41822. En Banc. May 4, 1972.]

THE DEPARTMENT OF GAME, Respondent and Cross-appellant, THE DEPARTMENT OF FISHERIES, Appellant, v. THE PUYALLUP TRIBE, INC., et al., Respondents and Cross-appellants.

- [1] **Fish—Indians—Off-reservation Fishing—State Conservation Rules—Applicability.** The right of Indians to fish off their reservations, as guaranteed to them by treaty, is subject to the reach of state powers and regulations annually determined to be necessary to the conservation of the fishery, providing such regulations are not discriminatory against the Indians.
- [2] **Fish—Indians—Off-reservation Fishing—State Conservation Rules—Multiple Species Fishery.** An otherwise permissible Indian fishing activity for a particular species may be prohibited as a reasonable and necessary conservation measure if the activity in question results in the catching of a substantial number of a protected species along with those authorized to be taken, endangering the conservation of the protected species.
- [3] **States—Indians—Treaties—Supremacy.** Statutes of this state must yield to rights of Indians preserved in treaties.
- [4] **Fish—Indians—Off-reservation Fishing—Nature of Right.** The right granted to certain Indians under the Treaty of Medicine Creek to fish at usual and accustomed places "in common with other citizens" is a greater right than that possessed by non-Indians. Regulations must be provided annually to permit such treaty Indians to fish a particular species whenever supporting facts and data disclose that such a fishery would not be inconsistent with necessary conservation measures.
- [5] **Fish—Injunction—Subjects of Relief—Fish Runs.** The enforcement of regulations by means of an injunction is permissible as a means of adequately protecting the conservation of a fishery, in the light of a continuing threat of violation, when the fish run is of substantially short duration and the prevention of the subject activity is shown to be vital to the conservation of the fishery.
- [6] **Injunction—Nature of Remedy—Right to Trial by Jury.** The purpose of an injunction is to prevent present or future wrongful acts, not to punish for past wrongful acts. Inasmuch as one who violates an injunction is subject to contempt proceedings, a jury trial is not properly available to him.
- [7] **Fish—Indians—State Conservation Rules—Validity—Burden of Proof.** While a state conservation rule adopted under proper procedures acquires a presumption of validity, an Indian may assert



treaty rights as a defense to a violation of the state rule by questioning the reasonableness of the regulation. The burden of establishing that the rule is supported by the evidence and is necessary to the conservation of the fishery, then shifts back to the state.

- [8] **Fish—Indians—Off-reservation Fishing—State Conservation Rules—Alternatives.** Insofar as protecting and conserving the anadromous fish run of a particular river is concerned, restrictions on the catching of fish in a body of water such as Puget Sound, where the runs of anadromous fish from all the rivers and streams flowing into that body of water are commingled, is not a feasible alternative to regulation of fishing on the river itself, or in Puget Sound where the fish run needing protection has split off from the commingled group.
- [9] **Judgment—Declaratory Judgment—Appropriate Action.** A case instituted under the declaratory judgment act by an agency of the state seeking guidelines for the adoption of continuing regulations is an appropriate means of considering all the issues of the case and obtaining a final determination of them.

HALE and ROSELLINI, JJ., dissent by separate opinion; UTTER, J., did not participate in the disposition of this case.

Appeal from a judgment of the Superior Court for Pierce County, No. 158069, Bartlett Rummel, J., entered December 30, 1970. *Affirmed in part; reversed in part; remanded.*

Action for a declaratory judgment. Appeals taken from a judgment substantially in favor of the defendants.

Slade Gorton, Attorney General, and William M. Ginery, Assistant, for appellant Department of Fisheries.

Slade Gorton, Attorney General, and J. L. Coniff, Assistant, for respondent Department of Game.

Shiro Kashiwa, Assistant Attorney General of the United States; Stan Pitkin, United States Attorney, and Jerald E. Olson, Assistant; and Robert S. Lynch and Thomas L. Adams, Jr., for respondent The Puyallup Tribe.

Wettrick, Toulouse, Lirhus & Hove, Arnold J. Barer, and Malcolm S. McLeod, for respondents Siddle et al.

John H. Sennhauser, for respondent Bennett.

HUNTER, J.—This appeal arises from a disposition by the

trial court of a remand by this court in the case of *Department of Game v. Puyallup Tribe, Inc.*, 70 Wn.2d 245, 422 P.2d 754 (1967).<sup>1</sup>

The action was instituted in the Superior Court for Pierce County in 1963 by the Department of Fisheries of the State of Washington (appellant) and the Department of Game of the State of Washington (respondent and cross-appellant), seeking by declaratory judgment to determine whether certain named individuals as members of the Puyallup Indian Tribe and the Puyallup Tribe (respondents and cross-appellants) were immune from the application of state conservation measures under their claimed rights to fish for anadromous fish in the Puyallup River under article 3 of the Treaty of Medicine Creek (10 Stat. 1132), which is as follows:

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

The Department of Fisheries and the Department of Game further sought a permanent injunction restraining the members of the tribe, and the tribe, from violating any fishing laws of this state or conservation regulations promulgated thereunder.

The trial court concluded that the Puyallup Tribe no longer existed as an entity and that its members no longer had any rights under the treaty; that there was no longer a

<sup>1</sup>As stated in footnote "1" of the original case, "The case caption is erroneous, there being no entity known as 'The Puyallup Tribe, Inc., a corporation.' The Puyallup Tribe of Indians did appear and answer by and through the chairman of the Tribal Council." *Department of Game*, 70 Wn.2d 247 n.1.

Puyallup Indian Reservation and that the Puyallup Indians had no fishing rights within what had been the reservation; that they were subject to state conservation laws and regulations as were all citizens, and the court permanently enjoined the defendants and all members of the "Puyallup Tribe" from fishing in the Puyallup River watershed and Commencement Bay in any manner contrary to the laws of the State of Washington, or to the rules and regulations of the departments.

Upon appeal to this court in that case, we held in summary in *Department of Game v. Puyallup Tribe, Inc.*, *supra*, at 260:

**Summary:** We have rejected the Departments' argument that the Indian treaties are of no force and effect and that the state may repudiate them at will.

We have ruled that the trial court had no jurisdiction to determine whether or not there had been a termination of the Puyallup Indian Tribe, and that the tribe continues to exist, at least so long as it is recognized as such by the appropriate agencies of the United States, or until Congress passes a termination act.

We have agreed with the trial court that there is no longer a Puyallup Indian Reservation, and that the Puyallup Indians no longer have any special or treaty rights to fish thereon because it was once a reservation; however, we hold that they continue to have a right to fish at usual and accustomed grounds and stations and that any regulations of the Departments limiting or restricting those rights must be reasonable and necessary for the preservation of the fishery.

The state has clearly met that test, at least to the extent that it has established that continued use by the defendants of their drift nets and set nets would result in the nearly complete destruction of the anadromous fish runs in the Puyallup River and that a regulation prohibiting the use of such nets was necessary for the preservation of the fishery.

We are, therefore, in accord with the conclusion of the trial court that an injunction should be entered in this case; however, the injunction entered by the trial court is much too broad. It permanently enjoins individual defendants and members of the federal organization known as the "Puyallup Tribe" from fishing in the Puyallup

River watershed and Commencement Bay in any manner that is contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington. It is predicated on the trial court's determination that the defendants have no treaty rights.

The cause must be remanded to the trial court for the entry of a judgment and decree predicated upon the proposition that the defendants do have treaty rights, but that they are subject to conservation regulations which are reasonable and necessary to preserve the fishery.

The essence of this opinion is—and the decree, as re-framed, should so reflect: (1) If a defendant proves that he is a member of the Puyallup Tribe; and (2) He is fishing at one of the usual and accustomed fishing places of that tribe; (3) He cannot be restrained or enjoined from doing so, unless he is violating a statute, or regulation of the Departments promulgated thereunder, which has been established to be reasonable and necessary for the conservation of the fishery.

The injunction should be tailored to the particular situation. A specific act or acts should be enjoined on the basis that there has been a violation of a statute or statutes, or a regulation or regulations promulgated thereunder, and that such regulation or regulations are reasonable and necessary for the preservation of the fishery. The findings, conclusions, and judgment in this case should be rewritten to show clearly the basis and the extent of the injunction.

The judgment and decree appealed from is set aside, and the cause is remanded for the purposes indicated in this opinion.

The United States Supreme Court granted certiorari in this case, *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1968), and unanimously affirmed this court on May 27, 1968, with the following conclusion, at page 401:

Whether the prohibition of the use of set nets in these fresh waters was a "reasonable and necessary" (70 Wash. 2d, at 261, 422 P. 2d, at 764) conservation measure was left for determination by the trial court when the Supreme Court, deeming the injunction in No. 247 too broad, remanded the case for further findings. When the

case was argued here, much was said about the pros and the cons of that issue. Since the state court has given us no authoritative answer to the question, we leave it unanswered and only add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase "in common with."

(Footnotes omitted.)

The remand trial in the superior court commenced on September 21, 1970.

In the meantime, the Department of Fisheries took action which they considered was consistent with our decision in *Puyallup* and with the decision of the United States Supreme Court, by limiting the commercial net fishery in the East Bay Pass area of Puget Sound to permit a larger escapement of salmon for the Puyallup River, and adopted regulations to permit a Puyallup Indian fishery in the Puyallup River. These respective regulations were the following:

(121) WAC 220-47-040 and WAC 220-47-060 as last amended are superseded in part by the following emergency regulation:

It shall be unlawful to take, fish for and possess salmon taken with purse seine and gill net gear in that portion of Puget Sound Salmon Fishing Area 6 lying between lines projected from Point Robinson Light to Des Moines Light and from Browns Point Light to Piner Point on Maury Island from 9:00 a.m. September 18 until further notice.

Section 3. This Order shall take effect as required by R.C.W. 34.04.040.

Dated this 18th Day of September, 1970.

WAC 220-47-115 ——— PUYALLUP RIVER — INDIAN FISHERY.

It shall be unlawful to take, fish for or possess salmon taken for commercial purposes in waters of the Puyallup River and its tributaries, except that it shall be lawful for enrolled members of the Puyallup Indian tribe to take, fish for and possess salmon taken for commercial purposes with gill net and set net gear in that portion of the Puyallup River lying between the City of Puyallup and the 11th Street Bridge, in Tacoma, during the period

September 21 through October 23, 1970, subject to the following regulations:

(1) It shall be unlawful to engage in this fishery during weekly closures from 6:00 p.m. Wednesday to 6:00 p.m. Sunday.

(2) It shall be unlawful to engage in this fishery with any set net extending more than  $\frac{1}{3}$  the width of the river.

(3) It shall be unlawful to engage in this fishery with gill net gear containing mesh larger than  $6\frac{1}{2}$  inches stretch measure.

(4) It shall be unlawful for any person fishing pursuant to these regulations to fish for salmon with net gear in any manner, time or place contrary to these regulations.

Evidence introduced by the Department of Fisheries at the trial on remand, was in justification of the action of the department as being within the ambit of conservation of the salmon fishery as related to the run in the Puyallup River for the year 1970.

The Department of Game failed to recognize any right of the Puyallup Indians under the Medicine Creek Treaty, other than their right to fish in the same manner and in common with other citizens of the state. The Department of Game introduced evidence to show that a commercial net fishery would be inconsistent with the conservation of the steelhead fishery.

The trial court dissolved the injunction against the members of the Puyallup Indians and the tribe on the grounds there was no showing of irreparable injury; that adequate criminal sanctions were available, and on the grounds that the granting of the injunction would deprive those in violation of their right to a jury trial. The trial court further held that the burden was upon the state to prove the regulations were reasonable and necessary for the conservation of the fishery.

The Department of Fisheries appeals from the dismissal of the injunction, and from the holding of the trial court limiting the enforcement of its regulations to criminal sanctions, and the placing of the burden of proof upon the state

to show the regulations were reasonable and necessary for the conservation of the fishery in each case.

The Department of Game appeals from the order dissolving the injunction, contending that the defendants have no treaty rights to fish contrary to the conservation statutes and the regulations adopted thereunder, and that the trial court erred in failing to hold that the steelhead fishery could not withstand a commercial fishery.

The Puyallup Indian Tribe and individual members' (respondents and cross-appellants) contentions will be stated in the latter part of this opinion.

[1] In considering the Puyallup Indians' treaty rights to fish under the Medicine Creek Treaty, since the decision of the United States Supreme Court, 391 U.S. 392, in its review of our decision in *Puyallup*, there can no longer be any question that whatever the United States Supreme Court may ultimately construe to be the Indian rights to fish under the Medicine Creek Treaty, they are subject to the reach of the state powers and regulations necessary to the conservation of the fishery, providing the regulations are not discriminatory against the Indians. The United States Supreme Court stated in *Puyallup*, on page 398:

But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one "in common with all citizens of the Territory." *Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State.* The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. Act of June 2, 1924, 43 Stat. 253, as superseded by § 201 (b) of the Nationality Act of 1940, 8 U. S. C. § 1401 (a)(2). *But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.*

In *Tulee v. Washington*, 315 U. S. 681, we had before us



for construction a like treaty with the Yakima Indians which guaranteed the right to fish "at all usual and accustomed places, in common with the citizens" of Washington Territory. 12 Stat. 951. Tulee, a member of the tribe, was fishing without a license off the Yakima Indian Reservation; the State convicted him for failure to obtain a license. We reversed, saying:

"[W]hile the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here." *Id.*, at 684.

*In other words, the "right" to fish outside the reservation was a treaty "right" that could not be qualified or conditioned by the State. But "the time and manner of fishing . . . necessary for the conservation of fish," not being defined or established by the treaty, were within the reach of state power.*

*The overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources, is preserved.*

(Italics ours.)

The first issue to be resolved is whether the regulations promulgated by the Department of Fisheries, to permit an Indian net fishery for coho salmon in the Puyallup River, come within the ambit of regulations conforming to the necessary conservation of the coho salmon fishery.

Conservation is defined by J. E. Lasater, Associate Director of Operations, Department of Fisheries, as follows:

A. Very simply, it is wise use. When we put it in terms of salmon harvest, I would put it in three categories or three parts, by harvest, in management of salmon as a crop, *one*, there must be a surplus and over and above the needed spawning escapement to have an available crop and not be taking the feed stock. *Two*, the manner of fishing, itself, must be such that you can control it so that you do not dip into the seed stock. . . . *The other thing is that the manner of fishing, itself, must not be destructive.*

(Italics ours.)

Mr. Lasater testified that the first time there was a return of coho fish surplus over spawning and hatchery needs on the Puyallup since 1964, was in the fall of 1969, and that the 1970 regulation authorizing an Indian net fishery on the Puyallup permitted a harvest of the surplus and a sufficient escapement for spawning and hatchery needs. Mr. Lasater testified as follows:

A. They will fish three days a week each week, starting on the 21st until, in late October— . . . I have mentioned that we fish in areas of passage, that is so that in a closed period fish actually move out of the fishery, and protected the four days, are to allow the fish to come from the milling area, Commencement Bay, pass completely through the fishery and into the spawning areas above without being fished, and the four days, we believe, is sufficient to pass a significant quantity of fish. So it is to allow a spawning escapement through the fishery. You must allow them time to move.

From this uncontradicted testimony, there is ample evidence in the record to support the reasonableness of the regulations to meet necessary conservation standards for the Indian coho fishery alone. However, another problem arises. Mr. Lasater also testified that "chinook salmon in the Puyallup system have not been built back to a point where they can withstand a fishery without damaging the potential future runs."

[2] The record shows that the manner of fishing in which the Indians engage for the catching of coho under the regulations, is with set or drift gill nets. In the recent case of *State v. Moses*, 79 Wn.2d 104, 483 P.2d 832 (1971), upon the basis of Mr. Lasater's testimony, we clearly determined that fish once caught or entangled in a gill net are injured to the extent that a very high mortality results. Thus, the coho gill net Indian fishery that results in the catch of other species of protected fish, such as chinook, to conform to necessary conservation requirements, cannot be permitted. It "flies" directly into Mr. Lasater's number three element of conservation—"The manner of fishing itself must not be destructive."

The record is not clear as to the number of chinook or other protected species of fish that are or will be caught in the gill nets during the period of Puyallup Indian coho fishery; however, it is clear that a selective gill net fishery, coho in this instance, cannot withstand the test of the necessary conservation of the fishery in the event substantial numbers of protected species are caught, resulting in a high percentage of their destruction and endangering the conservation of those protected species.

We therefore expressly hold that, as a guideline in an allowable Indian gill net fishery, a selective net fishery for the lawful catching of one species of fish is not permissible in the event there is a substantial number of protected species caught that are within the number required for spawning escapement and hatchery needs, necessary for conservation of the fishery of that species.

[3] We will now consider the separate contentions of the Department of Game. The department contends that statutes prohibiting net fishing for steelhead are controlling in the prohibition of an Indian net fishery. This contention is without merit. Statutes of this state must yield to rights the Indians may have under the Medicine Creek Treaty.

[4] The Department of Game further contends, however, that the Puyallup Indians have no fishing treaty rights other than those held in common with other citizens of the state. This contention is inconsistent with our holding in *Puyallup*. We hold that it is incumbent upon the Department of Game to provide, annually, regulations for a Puyallup Indian net fishery of steelhead when it is determined by the department, upon supporting facts and data, that an Indian net fishery would not be inconsistent with the necessary conservation of the steelhead fishery.

We are satisfied from the record in the present case, however, that a regulation authorizing an Indian net fishery for steelhead for the year 1970, in the Puyallup River, would have been destructive to the conservation of the steelhead fishery, and the Department of Game's contention

that there should be no commercial fishery in the Puyallup River for steelhead should be sustained as for that year.

Mr. Clifford J. Millenback, Chief of the Fisheries Management Division of the Department of Game, testified that the run of steelhead in the Puyallup River drainage is between 16,000 and 18,000 fish annually; that approximately 5,000 to 6,000 are native run which is the maximum the Puyallup system will produce even if undisturbed; that approximately 10,000 are produced by the annual hatchery plant of 100,000 smolt; that smolt, small steelhead from 6 to 9 inches in length, are released in April, and make their way to the sea about the first of August; that during this time all fishing is closed to permit their escapement; that the entire cost of the hatchery smolt plant, exclusive of some federal funds, is financed from licensee fees paid by sports fishermen. The record further shows that 61 per cent of the entire sports catch on the river is from hatchery-planted steelhead; that the catch of steelhead by the sports fishery, as determined from "card count" received from the licensed sports fishermen, is around 12,000 to 14,000 annually;<sup>2</sup> that the escapement required for adequate hatchery needs and spawning is 25 per cent to 50 per cent of the run; that the steelhead fishery cannot therefore withstand a commercial fishery on the Puyallup River.

Mr. Millenback further testified that, contrary to the salmon fishery, there is no commercial fishery of steelhead permitted; that the only fishing for steelhead is the sports fishery and that is primarily in the river itself.

We hold under this record that the steelhead fishery in the Puyallup River is not comparable to the salmon fishery; that (1) 61 per cent of the catch are hatchery fish, almost exclusively financed by licensee revenues of sports fisher-

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"DAILY CATCH AND POSSESSION LIMITS: Trout and Steelhead—Six pounds and 1 fish, not to exceed 12 fish but shall not include more than 2 steelhead over 20" in length.

"ANNUAL CATCH LIMIT—STEELHEAD ONLY: Thirty steelhead over 20" in length . . . " 1970 Game Fish Seasons and Catch Limits, 3 (Dep't of Game).

men; that (2) no commercial fishing for steelhead is permitted in any area; that (3) contrary to the salmon fishery, which is conducted almost entirely in areas other than in the river, the steelhead sports fishery of the Puyallup run is conducted almost exclusively in the Puyallup River; that (4) the catch of the steelhead sports fishery alone in the Puyallup River leaves no more than a sufficient number of steelhead for escapement necessary for the conservation of the steelhead fishery in that river.

The trial court was therefore in error in dissolving the injunction restricting a violation of steelhead fishing statutes and regulations as applied to the Puyallup River.

[5] The Departments of Fisheries and Game contend the trial court erred in holding that injunction was not a proper form of remedy in this case. We agree. We clearly stated in *Puyallup* that an injunction should be entered in this case, but that it was too broad and should be tailored to meet the specific act or acts.

Puyallup River fish runs are for substantially short durations and it is vital to the conservation of the fishery that adequate escapement be permitted during these periods. The continuing threat of violation of net fishing prohibitions and regulations by members of the Puyallup Indian Tribe, relying upon their asserted treaty rights to virtually an unregulated net fishery, justifies the remedy of enforcement by injunction to adequately protect the conservation of the fishery.

[6] The contention that the right of a jury trial is denied by the remedy of an injunction in this case, is without merit. The purpose of an injunction is not to punish the wrongdoer for past transactions, but to restrain present or threatened future wrongful acts. *Lewis Pac. Dairymen's Ass'n v. Turner*, 50 Wn.2d 762, 314 P.2d 625 (1957). Also, see, *State ex rel. Department of Pub. Works v. Skagit River Nav. & Trading Co.*, 181 Wash. 642, 45 P.2d 27 (1935). One who thereafter violates the injunction is subject to contempt proceedings and, under those circumstances, a jury trial is properly not available. See *People ex rel. Attorney*

*General v. Tool*, 35 Colo. 225, 86 P. 224 cited in *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.*, 67 Wash. 317, 121 P. 467 (1912).

[7] The Department of Fisheries contends that the trial court erred in its holding on the burden of proof in that the holding requires the department to mount a full scale conservation case and reestablish the necessity of its regulations in each and every enforcement action as part of its case in chief. The department argues that the burden of proof which is upon the state to show that its regulations are reasonable and necessary for the conservation of the fishery, when applied to Indian treaty fishing rights, must be met when the regulations are adopted in compliance with the notice and hearing provisions of the Administrative Procedure Act, RCW 34.04, and that thereafter a presumption of validity attaches. The burden of proof, it is contended, shifts back to the state upon a violation hearing involving a treaty Indian. We agree.

We hold that a presumption of validity attaches to a regulation once adopted under the procedure required by the Administrative Procedure Act. However, the right of a Puyallup Indian to assert his treaty rights at any time cannot be abridged. The unreasonableness of a regulation as a defense to a violation by a Puyallup Indian must be available at all times and, by reason of the advantage of the state in its expertise on fishing conservation issues, the burden must immediately shift to the state to establish that the regulation is supported by the evidence on grounds of being necessary for the conservation of the fishery.

[8] The Puyallup Tribe and the individual members, Ramona Bennett, James Siddle and Robert Satiacum (respondents and cross-appellants), in essence, contend that their rights under the Medicine Creek Treaty are not sufficiently recognized; that the limitation of their taking fish is too broad; and that the alternative of limiting the catch in Puget Sound should be invoked before limiting the catch of the Indians. They cite the testimony of their expert witness, James L. Heckman, Associate Regional Supervisor of

the Division of Fishery Services with the Bureau of Sports Fisheries and Wild Life of the Department of the Interior. He supports these respondent/cross-appellants' alternative theory that fishing should be cut off in Puget Sound to permit greater escapement for the Puyallup fishery. This theory is obviously without substance as related to the Puyallup River fishery, until the Puyallup River's run can be identified. This was referred to in Mr. Lasater's testimony as "splitting off" where the run of the different classes of fish can be identified by their "splitting off" from the commingled runs prior to their entrance into the river in which they return to spawn.

The "splitting off" of the coho run for the Puyallup River at the East Bay Pass area was considered by the Department of Fisheries and the alternative theory of limiting the catch before the run reaches the river was recognized by its promulgation of regulation order No. 680, plaintiff's exhibit 5, prohibiting commercial net fishing in the East Bay Pass area.

The alternative theory of the Indian respondents and cross-appellants is wholly without merit as related to the steelhead because no net fishery or commercial fishery is permitted for steelhead in any area and for the further reason that substantially all the steelhead fishery occurs after their entrance into the respective rivers to which they return.

The Puyallup Tribe and individual member respondents and cross-appellants also contend the Department of Fisheries failed to assume its burden of proving the regulations were necessary for the conservation of the runs of the respective species. We have heretofore discussed and disposed of this issue in this opinion.

It is contended in the Indian respondents' and cross-appellants' briefs that the burden of proof is upon the Departments of Fisheries and Game to prove their regulations are reasonable and necessary for the conservation of the fishery prior to their becoming effective. We have also heretofore discussed and disposed of this contention.



[9] It is also contended in briefs of the Indian respondents and cross-appellants that this case is moot. We must remember that this case was instituted under the declaratory judgment act, seeking guidelines for the adoption of continuing regulations, if any. It is therefore proper that all issues raised in this case be considered.

We have considered all of the arguments by the appellants, and respondents and cross-appellants not heretofore specifically mentioned and deem them resolved by our disposition of the contentions discussed in this opinion.

*In summary*, we hold:

(1) Puyallup Indian fishery regulations must be made each year supported upon facts and data that show the regulation is necessary for the conservation of the respective species of the anadromous fish in the Puyallup watershed;

(2) A selective gill net Puyallup Indian fishery cannot be allowed where a substantial number of species protected from the net fishery will be caught with those fish authorized to be taken, endangering the conservation of those protected species;

(3) The fishery regulations for coho in the year 1970 were reasonable, subject to the above limitation upon a selective Indian net fishery;

(4) This record does not support an Indian net fishery for the taking of steelhead for the year 1970;

(5) The alternative theory of cutting off fishing in Puget Sound to enhance the Puyallup River run of anadromous fish is unfeasible while species of anadromous fish are commingled prior to "splitting off" for return to watersheds in which they spawn;

(6) Injunction is the proper remedy for the enforcement of Indian fishery regulations in the instant case;

(7) A fishing regulation adopted under the Administrative Procedure Act will be presumed valid. The burden to prove the regulation was necessary for the conservation of the fishery will shift to the state upon its challenge, as a

defense by a Puyallup Indian, upon its violation, or upon an appropriate declaratory judgment proceeding.

The judgment of the trial court is reversed insofar as it is inconsistent with this opinion, and otherwise is affirmed. It is further ordered that the injunction be reinstated and the case remanded to the trial court for the appropriate modification of the injunction against the members of the Puyallup Indian Tribe, consistent with our holding in this opinion.

All parties will bear their own costs on this appeal.

HAMILTON, C.J., FINLEY, NEILL, STAFFORD, and WRIGHT, JJ., concur.

HALE, J. (dissenting)—There is, I perceive, a curious aura of romantic whimsy suffusing the law of Indian treaties. Indian treaty cases seem never quite fully to depart that peculiar genre of elemental melodrama compounded more of fantasy than fact, more of folklore than truth—all subject to the inevitable distortion of time and history—in order to reach a devoutly wished judicial consummation. Although this may make for good reading, it probably produces bad law. Inexorably inhering in these decisions on Indian treaties, I think, is the judicial conscience which aspires somehow to right what the courts think to be historical wrongs—even if the treaty is somehow twisted out of shape to achieve it. Thus, in Indian treaty law, the Indian occupies a traditionally exalted position; the pioneers and the government which encouraged them to settle and develop this Western frontier a correspondingly low one; and the treaties undergo an inevitable distortion in the process. The time must eventually come, however, when the courts will have to construe the Indian treaties as the parties intended and as common sense dictates. Whatever pangs of conscience the judiciary may have developed through the present century concerning treatment of the Indians more than a century ago at the hands of the citizenry, misconstruing the treaties is a poor means of expiation. Two wrongs do not make a right and the courts can-

not and ought not remedy such wrongs whether real or imagined by revising the treaties and inventing special rights in order to come up with a result which comports with the judiciary's ideas ex post facto of what the treaty should have said. If the treaties with the Indians did not afford treaty Indians exclusive rights or preferential privilege in the state's lakes, rivers, streams and bays, the courts ought not accord such preferential rights and privileges to their descendants.

Courts must accept the treaties as written and cannot alter or amend them. *Kansas or Kaw Tribe of Indians v. United States*, 80 Ct. Cl. 264 (1934), cert. denied, 296 U.S. 577, 80 L. Ed. 408, 56 S. Ct. 88 (1935); *Osage Tribe of Indians v. United States*, 66 Ct. Cl. 64 (1928), appeal dismissed and cert. denied, *Osage Indians v. United States*, 279 U.S. 811, 73 L. Ed. 971, 49 S. Ct. 251 (1929). If a treaty did not give the Indians special times and places in which to fish, the court is without power to write a new treaty giving their descendants such special privileges. Whatever rights Indians may once have possessed to treat with the United States as a contracting entity ended with the act of March 3, 1871, Rev. Stat. § 2079, 25 U.S.C. § 71, which abrogated the treaty-making power with the Indian nations and tribes.

Lacking the constitutional power to make treaties of any kind, the courts are equally without power to rewrite them from time to time or at all—even to achieve what the courts believe to be a good result. The judicial function is limited, I think, to enforcing and upholding the treaties according to their content and spirit. Accordingly, judicial process is not the medium nor is the courthouse the place to rectify the wrong, real or illusory, done to the Indians by the pioneers and the United States government more than a century ago. Any wrongs done the Indians, if genuine and shown to persist down through the generations, should be righted by the Congress.

The Treaty of Medicine Creek, negotiated in 1854 (Treaty With Nisqualli, Puyallup, Etc., 1854, 2 Indian Af-

fairs Laws and Treaties 495 (1902)), by the United States with a primitive people then under partial subjection to the war-declaring power of the Congress and the war-making power of the President, cannot be sensibly interpreted, I think, so as to award the descendants of these primitive people rights and privileges today in the state's waters not enjoyed in common by all of their fellow citizens of the state and the United States. The court's ruling, I fear, not only deprives citizens of the equal protection of the laws, but grants to some Indians as a class immunities and privileges not enjoyed by all citizens, including most Indians—all in violation of the Fourteenth Amendment.

A reading of the other treaties negotiated contemporaneously by Isaac I. Stevens with the Indians of the Pacific Northwest bears out, in my opinion, that the government of the United States, even before adoption of the Fourteenth Amendment, did not intend to disparage the citizen settlers' rights and correspondingly aggrandize Indians' rights, particularly during an era when the United States was encouraging the settlement and development of these Western territories by citizens; nor will it show a purpose to accord special off-reservation privileges to the Indians and their descendants.

Fishing is an art virtually as old as man; recorded history, anthropology and the Bible tell us so. By 1854, while there may have been little knowledge of and less apparent need for conservation of natural resources than today, the people of this country were undoubtedly aware of the great economic and social value of water resources. A century and a half of colonial history followed by two generations of national history could not help but impress upon the government and the pioneers the value of water as a highway for travel and commerce and its vital use in the production of food and fiber. They knew its importance, too, as a source of hydraulic power in manufacturing and as an indispensable resource in chemistry, irrigation, agriculture, and as a household necessity. A little common sense applied to the Indian treaties will reveal, I think, that the United States

did not intend to put Indians, when away from their reservation, in a superior position to that of the citizens of the territory with respect to the rivers, streams, lakes and tidal waters of the territory.

The Treaty of Medicine Creek itself is the best evidence of what it means for we have little else to go on. It was made between the United States and certain tribes and bands of Indians, signed by Isaac I. Stevens for the United States, December 26, 1854, ratified by the Senate March 3, 1855, and proclaimed by the President, April 10, 1855. Its explicit language that whatever off-reservation fishing rights the Indians may have are held "in common with all citizens of the Territory" (2 Indian Affairs Laws and Treaties 495 (1902), 10 Stat. 1132), is susceptible of no sensible interpretation other than that the Indians shall have no fishing rights that all citizens do not have and vice versa off the reservation. To make it mean something else requires an obvious distortion and misinterpretation.

This exact language of the treaty, incorporated as it was in other similar treaties contemporaneously negotiated with other tribes and bands, makes clear that the Indians were not to be excluded from fishing grounds off their reservation if the citizens of the territory were not excluded, but that these rights were to be coextensive only with those of the citizens of the territory. Article 3 of the Treaty of Medicine Creek as noted says:

ARTICLE 3. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter.

The entire treaty points to the same conclusion. In article 1, the Indians did "cede, relinquish, and convey to the

United States, all their right, title, and interest in and to the lands and country occupied by them." Article 2 reserved for their present use certain reservation lands. Article 4 provides that, in exchange for the cession of certain described lands, the United States pay to the signatory tribes \$32,500 in installments or annuities; another payment of \$3,250 under article 5 was to be paid to the Indians for expenses of removing to their reservation and "to clear, fence, and break up a sufficient quantity of land for cultivation." Had the Indians demanded and the government intended to grant them exclusive off-reservation rights to fishing, here was one of several logical places to say so.

The treaty was comprehensive and workable. Article 7 prohibited the annuities earlier described from being attached for individual debts; article 8 pledged the Indians to be friendly, refrain from making war, and refrain from concealing and protecting Indians who committed depredation against citizens of the territory. In article 9, the Indians acknowledged that they were "desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same" and agreed that any Indian who introduced liquor onto the reservation or who drank it stood to have his "proportion of the annuities withheld from him or her for such time as the President may determine."

Article 10 provided for the establishment of a general Indian agency by the United States government, and for free industrial and agricultural schools and the employment of "a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities."

Article 11, imposing higher moral standards upon the Indians than the government vouchsafed for the country at large, abolished slavery:

ARTICLE 11. The said tribes and bands agree to free



all slaves now held by them, and not to purchase or acquire others hereafter.

There is not a word in any of these articles, comprehensive as their contents were, nor in the other treaties, to suggest that either the Indians or the United States government intended that the Indian tribes and bands be accorded rights outside their reservations in the rivers, streams, lakes and Puget Sound superior to or not equally available to those of the citizens of the territory.

The fishing privileges contemplated by the Treaty of Medicine Creek were not unique. July 1, 1855, Isaac I. Stevens, acting for the United States, made a treaty with the Quinaielt, Quillehute and other tribes and bands. 2 Indian Affairs Laws and Treaties 539 (1902), 12 Stat. 971. That treaty employs identical language to the Treaty of Medicine Creek concerning off-reservation fishing privileges, stating explicitly in article 3, that "The right of taking fish at all usual and accustomed grounds and stations is secured . . . in common with all citizens of the Territory." (Italics mine.)

Here, too, as in the Medicine Creek Treaty, had it been intended that the Indians were to acquire off-reservation hunting and fishing rights superior to those of the citizens of the territory, the treaty contains many articles where such provisions could logically have been made, including article 2 reserving for the Indians certain described lands for reservations "for their exclusive use" and declaring "no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent." In this as in the other treaties, the Indians agreed to "remove to and settle upon the [reservation] within one year," thus expressing an intention to put the treaty into early effect and to suit their actions to the words of the treaty.

Nor should we, in considering the Treaty of Medicine Creek, now before the court, overlook the Treaty of Point Elliott, 2 Indian Affairs Laws and Treaties 501 (1902), 12 Stat. 927, negotiated by Isaac I. Stevens at Mucklteoh, Jan-



uary 22, 1855, with the Dwamish, Suquamish and other tribes and bands. The Treaty of Point Elliott employs the very language appearing in the Treaty of Medicine Creek and in the treaty with the Quinaielt, Quillehute and other tribes and bands, stating in article 5:

ARTICLE 5. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.*

(Italics mine.)

The remaining provisions, nearly identical to those of the Medicine Creek Treaty now before us and to those of the treaty with the Quinaielt and other tribes, make no provision for special off-reservation fishing privileges. As with the Treaty of Medicine Creek and the treaty with the Quinaielt, Quillehute and other tribes and bands, the Treaty of Point Elliott contains not even a hint that the Indians or their descendants would acquire, even temporarily, much less forever, off-reservation fishing rights not to be held in common with the citizens of the territory.

Similarly, in the Treaty of Point-No-Point, 2 Indian Affairs Laws and Treaties 504 (1902), 12 Stat. 933, made by Isaac I. Stevens, January 26, 1855, on behalf of the United States with the S'Klallam and other tribes, article 4 declares that "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, *in common with all citizens of the United States.*" (Italics mine.) Here one should note a minor departure from the language of the three other treaties, describing the settlers as citizens of the United States rather than as citizens of the territory. In this, as in the three other treaties, one cannot find any language from which exclusive off-reservation Indian fishing rights may be inferred. Elsewhere, the Treaty of Point-No-Point makes clear, as do the

other treaties, that the settler's cultivated lands, crops and animals are to be protected from Indian trespass, thus eliminating the inevitable claim that special off-reservation fishing rights carry with them correlative rights to go upon the private lands and riverbanks and break the settler's close.

Nothing in any of the four mentioned treaties suggests that the Indians reserved or were to be awarded hunting and fishing rights save "in common with all citizens of the territory." The United States, seeking to promote the development of this Western frontier, obviously did not intend to put the primitive peoples with whom it was negotiating in a vastly superior position to use and exploit the waters of the territory to that of the settlers whom the government was then trying to induce to settle here. Manifestly, the purpose of the United States was to secure to the settlers a fair degree of protection from marauding Indians, cut down on Indian depredation, and elevate the standard of living of these primitive peoples according to the standards of the day, and to prevent the settlers from cutting off the Indians' rights to fish in those places where the settler elected also to fish. Allowing exclusive on-reservation rights and common off-reservation rights was obviously designed to prevent discrimination against the Indian in fishing, to permit the Indian to fish where the settlers chose to fish, not to enhance the position of the Indian and his descendants with respect to fishing.

In essence, the treaties say no more about fishing than that off their reservation the Indians should not be barred from exploiting those natural uncultivated fish resources to the same extent that the settlers permitted themselves to exploit them. The treaties are not, in my opinion, sensibly susceptible of a converse reading that the Indians off their reservation can bar the citizens from fishing where the Indians had customarily fished.

On January 31, 1855, Isaac I. Stevens negotiated a treaty with the Makah at Neah Bay, 2 Indian Affairs Laws and Treaties 510 (1902), 12 Stat. 939, containing substantially

the same provisions as the other four mentioned treaties but with a significant enlargement of the Indians' fishing rights so as to include whaling and sealing:

ARTICLE 4. *The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands: Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.*

(Italics mine.)

Here, again, it should be noted, in common with all other treaties negotiated with the Indians in what has now become Washington state, the right of taking fish is secured to the Indians *in common with all citizens of the United States* and to the privilege of taking fish has been added in this particular treaty the privilege of taking whales and seals, but again only *in common with the citizens of the United States*.

Should this treaty of 1855 with the Makah be read so as to reserve to the Indians extraordinary rights of sealing and whaling not held by all citizens of the United States—that is, the right to take seals and whales under the treaty not only then but now? The court's interpretation of the Treaty of Medicine Creek when applied to the treaty with the Makah would mean, I think, that the Makah still possess whaling and sealing rights not held by all other citizens. Before giving this treaty with the Makah so absurd a construction, one should ponder possible international implications arising from it.

Other treaties contemporaneously negotiated with the Indians of the Pacific Northwest shed additional light on the meaning of the instant treaty and demonstrate that, where exclusive rights were intended, Indians and the government had no difficulty in saying so. Thus, in granting exclusive fishing rights to the Indians in waters in or bordering their reservations, explicit language was employed in a

treaty signed June 9, 1855, in the Walla Walla Valley at Camp Stevens between Isaac I. Stevens and the Walla Walla. 2 Indian Affairs Laws and Treaties 521 (1902), 12 Stat. 945. The treaty says, in article 1,

*That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them.*

(Italics mine.)

In the Walla Walla Treaty, the Indians and the United States elected to reserve to the Indians "the *exclusive right of taking fish in the streams running through and bordering said reservation,*" and outside their reservation, in common with citizens of the United States, and they had no difficulty selecting the words admirably designed to convey that idea. (Italics mine.) One should note how the two ideas are placed side by side to effect a sublime clarity—first the exclusive right within and bordering the reservation, and then off the reservation, *at all usual and accustomed stations in common with citizens of the United States.* The most sophisticated and learned of counsel would be hard put today to express this agreement with more clarity or greater economy of words. The phrase "in common with citizens of the United States"—explicit, straightforward and concise—means, I hope, precisely what the words say, i.e., the Indians and their descendants acquired no rights or privileges outside or bordering their reservations not enjoyed or to be enjoyed by all citizens of the United States.

These precise distinctions between exclusive and shared fishing rights—that is, on-reservation rights and those to be held in common with the citizens of the territory—were again made in the treaty with the Yakima, 2 Indian Affairs Laws and Treaties 524 (1902), 12 Stat. 951, signed on be-

half of the United States by Isaac I. Stevens, June 9, 1855, at Camp Stevens, Walla Walla Valley. That treaty with the Yakima in article 3, in pertinent part, reads:

*The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.*

(Italics mine.)

As with the Walla Walla, this treaty by eloquent juxtaposition marks well the distinction between exclusive fishing rights in all streams running through or bordering the reservations, and in those shared rights and privileges in all other waters which are to be held in common with the citizens of the territory.

Nor is the language used in the Walla Walla and Yakima treaties to be treated as mere coincidence or fortuity, for an identical clause appears in the treaty with the Nez Perces, 2 Indian Affairs Laws and Treaties 528 (1902), 12 Stat. 957, signed by Isaac I. Stevens for the United States, June 11, 1855, at Camp Stevens in the Walla Walla Valley. This Nez Perce treaty too employed the same juxtaposition of language to vouchsafe to the Indians "exclusive right of taking fish in all the streams where running through or bordering said reservation," but off the reservations only "the right of taking fish at all usual and accustomed places in common with citizens of the Territory."

Thus, a reading of all of these treaties, negotiated as they were at about the time of the Treaty of Medicine Creek in 1854, makes clear, I think, that neither the Indians nor the government had any difficulty whatever in describing or understanding the idea of reserving to the Indians exclusive fishing rights upon or adjoining their reservations and allowing them fishing rights and privileges in common with the citizens in all other waters. Rights and privileges held

in common protected the Indians from invidious discrimination and exclusion in a treaty that at the same time protected the settlers' lands and crops and animals from trespass and damage.

The Treaty of Medicine Creek thus expressed a mutual purpose that the Indians and their descendants should retain off the reservations fishing rights in the state's lakes, rivers and streams and tidal waters only in common with and to be enjoyed by all citizens of the territory. On the reservation, the Indians' rights to fish were exclusive; off the reservation, the Indians shared them with the citizens of the territory. If the citizens could not fish, neither could the Indians.

I can reach no other sensible conclusion in the face of this clear and express language except by a process of extravagant judicial interpretation and resort to invention and innovation, amounting to the rewriting of the old or promulgation of a new treaty. The time has come at long last for the courts to brush away the fog, fantasy, folklore and mythology upon which I perceive these Indian treaty decisions appear to rest and to read the treaties as they were intended by both the Indians and the government to be read.

There is yet another reason why the treaties cannot be read to award off-reservation fishing rights to the descendants of the tribal signatories so as to give off-reservation rights not to be held or exercised in common by all other citizens. In 1868, long after these treaties were signed, the Fourteenth Amendment was adopted to prohibit the perpetration of political inequality. It expressly provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." (Italics mine.) Presumably no class of citizens is to be excluded from its protection because of race, color, creed or national origin. For the purpose of this case, all of the claimant Indians in this case should be deemed citizens of

the United States and of the State of Washington. The court now reads the Treaty of Medicine Creek so as to abridge the privileges of all citizens other than descendants of the Puyallups by giving the latter the privilege of taking fish from the Puyallup River and at the same time denying to all other citizens of the state and the United States the equal protection of the laws to do the same thing. It will give to the descendants of the Puyallups special open seasons with special commercial gear, neither of which privilege is open to all others. The opinion thus not only violates the plain language of the treaty by granting to Indian citizens rights to fish not enjoyed in common by all other citizens of the state and nation, but also contravenes the express language and violates the spirit of the Fourteenth Amendment.

Finally, I agree that the record supports the trial court's finding that the Puyallup Tribe ceased to exist as a tribal entity; that its members no longer possessed any fishing rights whatever under that treaty; that the Puyallup Indian Reservation had long ago ceased to exist; and that the descendants of the Puyallup retained no fishing rights within the area that formerly comprised that reservation. The members of the Puyallup Tribe, Inc., a federal organization, as the trial court found, therefore, for these added reasons have no fishing rights not held in common with all of their fellow citizens of the State of Washington and of the United States.

ROSELLINI, J., concurs with HALE, J.



# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. —

THE PUYALLUP TRIBE, PETITIONER

v.

THE DEPARTMENT OF GAME OF THE STATE OF  
WASHINGTON

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF WASHINGTON

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The Solicitor General, on behalf of the Puyallup Tribe, petitions for a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Washington in this case.

## OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is reported at 80 Wash. 2d 561, 497 P.2d 171, and is reprinted in the appendix to the petition for a writ of certiorari in *Department of Game of the State of Washington v. The Puyallup Tribe*, No. 72-481. That court's previous opinion in this case is reported at 70 Wash. 2d 245, 422 P.2d 754; and this Court's opinion upon review of that decision is reported at 391 U.S. 392. The findings and conclusions of the Superior Court for Pierce County, Washington (App., *infra*, pp. 10-16) are unreported.

(1)

### JURISDICTION

The judgment of the Supreme Court of Washington was entered on May 4, 1972. Timely petitions for rehearing were denied by that court on June 23, 1972. On September 20, 1972, Mr. Justice Douglas extended the Tribe's time for filing a petition for a writ of certiorari to November 20, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

### QUESTION PRESENTED

Whether a state conservation regulation absolutely prohibiting the Puyallup Indians from net fishing for steelhead trout at their usual and accustomed places, rather than limiting sport fishing so as to preserve some measure of the Indians' net fishery, violates the Treaty of Medicine Creek as interpreted in the prior decision of this Court in this case.

### STATUTES AND TREATY PROVISIONS INVOLVED

The Treaty of Medicine Creek, 10 Stat. 1132, Article III, provides:

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, \* \* \*.

Revised Code of Washington 77.16.060 provides:

It shall be unlawful for any person to lay, set, use, or prepare any drug, poison, lime, medicated bait, nets, fish, berries, formaldehyde, dynamite, or other explosives, or any tie-up, snare or net, or trot line, or any wire, string, rope, or cable of any kind, in any of the waters of this state with intent thereby to catch, take

or kill any game fish. It shall be unlawful to lay, set or use a net capable of taking game fish in any waters of this state except as permitted by regulation of the department of fisheries: *Provided*: That persons may use small landing nets or under written permit issued by the director may use nets or seines in the taking of nongame fish.

Any person violating any of the provisions of this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

4 Washington Administrative Code 232-12-340 provides:

**WAC 232-12-340 MAXIMUM NUMBER OF FISHING LINES AND HOOKS—SNAGGING AND GAFFING FISH UNLAWFUL.** It shall be unlawful for any person to snag, spear, trap, shoot, or attempt to snag, spear, trap or shoot any game fish. No person shall fish for game fish in any other manner than with one line or rod held in the hand, and that such line or rod shall be under his immediate and absolute control. For the purpose of this regulation a hook means one single, double or treble fish hook. Any fishing line may have attached thereto any number of flashers or blades but no more than two hooks, flies or artificial lures, or a combination of same. Artificial lures may have attached thereto any number of hooks. **PROVIDED**, That fresh water lingcod may be taken from Lake Palmer in Okano-

gan County, Lake Kachess, Keechelus and Cle Ellum in Kittitas County with no more than one set line having attached thereto any number of hooks. Any set line must have attached an indestructible tag with the true name and address of the owner in legible English.

#### STATEMENT

This case concerns the validity of the application to the Puyallup Tribe of Indians of regulations of the State of Washington prohibiting net fishing for steelhead trout. The case was previously before this Court in 1968, at which time this Court affirmed the judgment of the court below remanding the case to the trial court for further findings of fact. 391 U.S. 392. Essentially, the issues to be decided on remand were whether the Washington regulations prohibiting the taking of steelhead trout by net were reasonably required in the interest of conservation, gave adequate consideration to the rights granted the Tribe by treaty, and did not discriminate against the Indians. On remand, the trial court, after a hearing, dissolved the injunction prohibiting Puyallup Indians from taking fish by net. It held that adequate criminal sanctions were available to prevent such fishing and that in any criminal case the State would have the burden of proving that the regulations in effect at that time were reasonable and necessary for the conservation of fish.

Both plaintiffs and defendants appealed to the Supreme Court of the State of Washington. That court held that the regulations prohibiting fishing by net for

steelhead trout for the year 1970 were valid, that new fishing regulations for the Puyallup Tribe must be made each year supported by facts and data that show the regulation is necessary for the conservation of the species of fish in question, and that the injunction against the Tribe should be reinstated subject to modifications consistent with the opinion of the court. The court upheld the 1970 prohibition of net fishing for steelhead trout on the ground, *inter alia*, that "the catch of the steelhead sports fishery alone in the Puyallup River leaves no more than a sufficient number of steelhead for escapement necessary for the conservation of the steelhead fishery in that river." 80 Wash. 2d. at 573. Petitions for rehearing timely filed by the Department of Game of the State of Washington and by the Puyallup Tribe were denied. The Department of Game has filed a petition for a writ of certiorari (No. 72-481), and Ramona C. Bennett has filed a conditional cross-petition (No. 72-5437).

#### REASONS FOR GRANTING THE WRIT

The decision below, in our view, fails to adhere to the guidelines previously set forth by this Court in this case, in that the approved regulatory scheme involves discrimination against the Puyallup Tribe's treaty rights which is not necessary for the conservation of fish. This Court held that the Tribe's treaty right to take fish at their accustomed places may be regulated for the conservation of fish "provided the regulation meets appropriate standards and does not discriminate against the Indians," although "any ultimate findings on the conservation issue must also cover the

issue of equal protection implicit in the phrase 'in common with' " (391 U.S. at 398, 403).

In upholding, as applied to the Puyallup Tribe in 1970, the State's classification of the steelhead as a game fish, R.C.W. 77.08.020, and its prohibition of taking game fish by nets, R.C.W. 77.16.060, the court below reasoned (80 Wash. 2d 561, 573):

[T]he catch of the steelhead sports fishery alone in the Puyallup River leaves no more than a sufficient number of steelhead for escapement necessary for the conservation of the steelhead fishery in that river.

The decision thus permits net fishery by the Tribe only if there are enough fish left *after* sportsmen have taken the catch permitted them by the State. In so holding, the court rejected the Tribe's contention (Br. p. 12) that sport fishing should be sufficiently limited to avoid total or unwarranted preemption of the traditional Indian fisheries protected by the treaty of Medicine Creek. Thus, although the opinion below directs the Department of Game to review annually the possibility of a netting season for the Tribe, it also clearly permits the State to reserve steelhead trout exclusively for sport fishing and, in light of the State's past deference to game fishermen, there is little prospect that Indian net fishing would ever be allowed.



Since this Court's previous decision in the present case, two thoughtful decisions of lower courts have developed standards for accommodating the interests of the States and sportsmen in sport fishing with the interests of Indians in their traditional fishing. *Sohappy v. Smith*, 302 F. Supp. 899, 909-910 (D. Ore.); *State v. Tinno*, 94 Idaho 759, 497 P. 2d 1386, 1393. These decisions, we submit, rather than the decision below, properly apply the principles set forth by this Court. In both cases the courts recognized that when Indians entered into treaties for taking fish they were concerned not with sport fishing, but with taking fish for consumption and trade. These decisions further recognize that state regulation of Indian fishing rights must distinguish between the States' legitimate interest in conservation of fish and improper allocation of fish to one group in abrogation of the federally protected treaty rights of another.<sup>1</sup>

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<sup>1</sup>The present case differs from *Moses v. State of Washington*, No. 71-5423, certiorari denied, 406 U.S. 910, in two important respects. Here, in contrast to the Tribe involved in *Moses*, there is no doubt that the Puyallup Tribe was a party to the treaty of Medicine Creek and has the treaty rights it asserts. And here, rather than finding that conservation needs require prohibition of all net fishing in the Puyallup River, the Supreme Court of Washington has specifically authorized such fishing but only if there are sufficient fish left after sport fishermen have taken their catch without any limitation based on Indian treaty rights.



## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,  
*Solicitor General.*

KENT FRIZZELL,  
*Assistant Attorney General.*

HARRY R. SACHSE,  
*Assistant to the Solicitor General.*

EDMUND B. CLARK,  
THOMAS L. ADAMS, Jr.,  
*Attorneys.*

NOVEMBER 1972.

## APPENDIX

In the Superior Court of the State of Washington  
for Pierce County

No. 158069

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,  
AND THE DEPARTMENT OF FISHERIES OF THE STATE  
OF WASHINGTON, PLAINTIFFS

*vs.*

THE PUYALLUP TRIBE, INC., A FEDERAL ORGANIZATION,  
ET AL., DEFENDANTS

### *Decree*

This matter having come on regularly for trial before the undersigned judge of the above-entitled court pursuant to a supplemental petition of plaintiffs seeking an amended injunction, and upon the remand of the Supreme Court of the State of Washington after prior proceedings in this court and the state supreme court's decision in 70 Wn. 2d 245, 422 P.2d 754 (1967), and the U.S. Supreme Court's decision in 391 U.S. 392, 88 Sup. Ct. 1725, 20 L.Ed. 2d 689; and the plaintiffs having been represented by the Honorable Slade Gorton, attorney general of the state of Washington, through Mr. Joseph L. Coniff, his assistant for the Department of Game, and Mr. William N. Gingery, his assistant for the Department of Fisheries; and the defendants being represented by the Honorable Stan Pitkin, U.S. attorney for the Western District of Washington, through Mr. Jerald E. Olson, his assistant, appearing for the defendant Puyallup Tribe; Mr.

Jack E. Tanner appearing for the defendant Silas Cross; Mr. Arnold J. Barer appearing for the defendants Satiacum and Siddle; Mr. Frank Wright appearing pro se; and Mr. John Sennhauser appearing for the defendant Ramona Bennett; and the court having entered its findings of fact and conclusions of law, and being fully apprised in the premises; now does, therefore,

Order, adjudge, and decree as follows:

1. The findings of fact and conclusions of law entered in this cause upon this date are incorporated herein by this reference as though fully set forth, and are declared to govern the rights, status, and other legal relationships between the parties hereto pursuant to RCW 7.24.010.

2. The temporary injunction heretofore entered by this court against the defendants is hereby dissolved.

Done in open court this 30th day of December, 1970.

BARTLETT RUMMEL,

*Judge.*

In the Superior Court of the State of Washington for  
Pierce County

No. 158069

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,  
AND THE DEPARTMENT OF FISHERIES OF THE STATE  
OF WASHINGTON, PLAINTIFFS

*vs.*

THE PUYALLUP TRIBE, INC., A FEDERAL ORGANIZATION,  
ET AL., DEFENDANTS

*Findings of Fact and Conclusions of Law*

This matter having come on regularly for trial before the undersigned judge of the above-entitled court pursuant to a supplemental petition of plaintiffs seek-

ing an amended injunction, and upon the remand of the Supreme Court of the State of Washington after prior proceedings in this court and the state supreme court's decision in 70 Wn. 2d 245, 422 P. 2d 754 (1967), and the U.S. Supreme Court's decision in 391 U.S. 392, 88 Sup. Ct. 1725, 20 L. Ed. 2d 689; and the plaintiffs having been represented by the Honorable Slade Gorton, attorney general of the State of Washington through Mr. Joseph L. Coniff, his assistant for the Department of Game, and Mr. William N. Gingery, his assistant for the Department of Fisheries; and the defendants being represented by the Honorable Stan Pitkin, U.S. Attorney for the Western District of Washington, through Mr. Jerald E. Olson, his assistant, appearing for the defendant Puyallup Tribe; Mr. Jack E. Tanner appearing for the defendant Silas Cross; Mr. Arnold J. Barer appearing for the defendants Satiacum and Siddle; and Mr. John Sennhauser appearing for the defendant Ramona Bennett; and the court having reviewed the files and records herein insofar as material to the instant proceedings, and having heard extensive evidence, reviewed briefs and argument of counsel, and entered a memorandum decision herein, now enters the follow [sic]:

#### **FINDINGS OF FACT**

##### **I**

The Department of Fisheries has adopted a regulation admitted into evidence as exhibit #3 hereto, effective September 12, 1970, providing that it would be lawful for members of the Puyallup Tribe to take fish for, and possess salmon taken for commercial purposes, with gillnet and set nets in that portion of the Puyallup River lying between the city of Puyallup and the 11th Street Bridge in Tacoma, during the

period September 21 through October 23, 1970. This regulation is subject to the conditions that it would be unlawful to engage in this fishery during weekly closures from 6:00 p.m. Wednesday to 6:00 p.m. Sunday; that no set net could be used which extended more than one-third the width of the river, and that it would be unlawful to engage in this fishery with gillnet gear containing mesh larger than 6½ inches stretch measure.

## II

The Department of Fisheries has determined that the Puyallup River system has a potential as a salmon producer considerably above present levels and is engaged in efforts to expand the runs in this river.

## III

The Department of Fisheries has promulgated regulations recognizing special off-reservation treaty Indian fishing rights. In addition, it has declared as its policy the commitment of additional resources toward building up runs in the Puyallup River.

## IV

For conservation reasons the Department of Fisheries limited the geographical scope of this fishery to that area of the river above the milling grounds at the mouth of the river and in Commencement Bay, and yet below the spawning grounds of the Puyallup River and its tributaries. The Department also limited the time and manner of fishing to permit escapement of salmon to the spawning areas to insure perpetuation of the species.

## V

The Department of Fisheries extended the closure of the East Pass area to commercial fishing to protect the Fall 1970 run of spawning coho salmon to the Puyallup treaty Indian fishery. The Department did not place additional closures on fishing in Northern Puget Sound or the Strait of Juan de Fuca. Such additional closures could not be made specific to the Puyallup salmon in those areas because the stocks were still thoroughly mixed with feeding fish and the spawning salmon are destined for many other rivers and streams.

## VI

A biologist from the Fisheries Department testified in the proceeding before this court that during the year 1970 there is a large run of coho and the period designated in the regulation for this opening to Indian net fishery was geared to permit fishing only on this coho run.

## VII

The Department of Fisheries did not set a 1970 season for a chinook salmon net fishery in the Puyallup River because it felt that this run could not yet stand such a fishery.

## VIII

After a review of all the facts, the action by the Department of Fisheries in passing the regulation is not unreasonable as far as the Indians are concerned.

## IX

The Department of Fisheries has failed in its proof in showing a factual basis for the necessity of an in-

junction. There has been no proof that the Indians have violated the regulation referred to in Finding I hereof, nor is there any proof that it is necessary that Indians be enjoined from violating that regulation.

## X

With respect to the Department of Game, the evidence shows that the Puyallup River normally would produce about 5,000 steelhead trout per year. By hatchery plants, the department has increased the annual take for licensed sport fishermen to 12,000 to 18,000 steelhead a year.

## XI

The Department of Game in regulating game fish resources has not taken into consideration the treaty rights of the Indians as decreed by the Supreme Court. The Department of Game has not adopted a regulation recognizing the treaty rights of the Indians and hence its law and regulations are not shown to be reasonable and necessary.

From these findings of fact, the court makes the following:

### CONCLUSIONS OF LAW

#### I

Members of the Puyallup Tribe have fishing rights, secured by the Treaty of Medicine Creek.

#### II

The Department of Game and the Department of Fisheries have the exclusive power to make necessary and reasonable regulations for the conservation of the fish.

#### III

The burden of proof that an Indian is a member of the Puyallup Tribe is upon the Indian.



## IV

The burden of proof to establish that the regulations restricting treaty Indian off-reservation fishing are reasonable and necessary for the conservation of the fish resources is upon the departments.

## V

The Department of Fisheries has met the burden of proof that its regulation admitted into evidence herein is reasonable and necessary for the preservation of the fish resource.

## VI

The Department of Fisheries can show no irreparable injury, and is adequately protected by criminal sanctions. The granting of an injunction would deprive the defendants of their right of jury trial with respect to any alleged violation of statute or regulation.

## VII

The Department of Fisheries is not entitled to an injunction.

## VIII

The Department of Game has failed to show that it is entitled to any injunctive relief for the same reasons as applied to the Department of Fisheries, and in addition because it has failed to give any consideration to Indian treaty fishing rights as decreed by the Supreme Court.

## IX

Before the Department of Game may restrict members of the Puyallup Indian Tribe from fishing at off-reservation usual and accustomed fishing places of that Tribe, it must adopt regulations that conform

to the requirements heretofore prescribed by the Supreme Court in this case.

## X

The temporary injunction issued herein upon the supplemental petition of the plaintiffs should be dissolved.

Done in open court this 30th day of December, 1970

BARTLETT RUMMEL,

*Judge.*

**IN THE  
SUPREME COURT  
OF THE  
UNITED STATES**

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October Term, 1972

No. 72-746

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**THE PUYALLUP TRIBE, *Petitioner***

**v.**

**THE DEPARTMENT OF GAME OF THE  
STATE OF WASHINGTON, *Respondent***

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**ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE  
STATE OF WASHINGTON**

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**MEMORANDUM FOR THE DEPARTMENT OF  
GAME OF THE STATE OF WASHINGTON**

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**SLADE GORTON,**  
*Attorney General,  
State of Washington,*

**JOSEPH L. CONIFF,**  
*Assistant Attorney General,  
Counsel for Respondent.*

**JOSEPH L. CONIFF,**  
*Counsel of Record.*

600 No. Capitol Way,  
Olympia, WA. 98504  
February 22, 1973.

IN THE  
**SUPREME COURT**  
OF THE  
UNITED STATES

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October Term, 1972

No. 72-746

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THE PUYALLUP TRIBE, *Petitioner*

v.

THE DEPARTMENT OF GAME OF THE  
STATE OF WASHINGTON, *Respondent*

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE  
STATE OF WASHINGTON

---

**MEMORANDUM FOR THE DEPARTMENT OF  
GAME OF THE STATE OF WASHINGTON**

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The Federal Government, on behalf of the Puyallup Tribe of Indians, has filed a petition for a writ of certiorari to the Supreme Court of the State of Washington in this cause. By order of the Court, the Washington State Department of Game has been directed to file a memorandum responsive to the Government's petition.<sup>1</sup>

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<sup>1</sup>It should be noted that the Department of Game of the State of Washington has similarly filed a petition for a writ of certiorari to the Supreme Court of the State of Washington on this same opinion. *Department of Game v. Puyallup Tribe*, 80 Wn.2d 561 (1972) U. S. Supreme Court Docket No. 72-481, October Term, 1972.

The Government's memorandum in opposition to Game's previously filed petition for a writ of certiorari to the same opinion of the court below is apparently predicated upon their effort to limit the scope of the questions which may be argued by Game should this Court grant the Government's petition.<sup>1</sup> It is Game's position that *both* the petitions for a writ of certiorari filed by the Government and by Game should be granted so that all questions may be fully presented to the Court.

The Government argues in its petition that members of the Puyallup Tribe of Indians are being discriminated against in enjoyment of their claimed treaty commercial net fishing rights for game fish because sportsmen are allowed, under state law and regulation, to take fish at these same locations by means of hook and line. Game submits that the Government has misconceived the thrust of this Court's opinion in *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968). Justice Douglas, speaking for a unanimous Court, pointed out that the "in common with" language of the treaty in question incorporated the equal protection concepts of the Fourteenth Amendment. 391 U.S. at 401-403. The issue to be resolved is whether the state, in accordance with the opinion below, must discriminate against all non-Indians insofar as they are permitted to fish with hook and line for game fish in the Puyallup River by authorizing special Puyallup Indian only commercial

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<sup>1</sup>See: *Irvine v. California*, 347 U.S. 128 at 129 (1954).

net fisheries for game fish at these same locations along this river. Game believes that the position of the parties are diametrically opposed in interpreting the *Puyallup* decision, *supra*, and that this case presents a question of substantial and fundamental constitutional importance which justifies this Court in granting both the Government's and Game's petitions for writ of certiorari.

An additional reason for granting the requested writs of certiorari should be mentioned. Attached to this memorandum as appendix is a copy of a complaint entitled *United States of America v. State of Washington*, United States District Court, Western District of Washington, Civil No. 9213 (Appendix "A"). This case is presently set for trial on July 2, 1973. In this case the Federal Government sued the State of Washington seeking declaratory and injunctive relief against the application of the state conservation laws as applied to a great many Indian tribes resident in Western Washington. Fifteen Indian tribes have been permitted to intervene in this case.

Also attached is a copy of the complaint entitled *United States of America v. State of Washington*, United States District Court, Western District of Washington, Civil No. 39-71C3 together with a copy of the court's memorandum decision and order and the Government's notice of appeal to the Ninth Circuit Court of Appeals (Appendix "B"). This case

was filed against the State of Washington as a result of the Government's interpretation of footnote one of *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968) regarding the status of the Puyallup Indian Reservation.

Game submits that a multiplicity of litigation can and should be properly avoided in the lower courts and urges this Court to grant both the Government's and Game's petitions for writ of certiorari in this matter.

Respectfully submitted:

SLADE GORTON,  
Attorney General,  
State of Washington,

JOSEPH L. CONIFF,  
Assistant Attorney General,



## APPENDIX "A"

STAN PITKIN

United States Attorney  
1012 United States Courthouse  
Seattle, Washington 98104  
(206) 583-4735

*Attorney for Plaintiff,*  
United States of America

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

CIVIL No. 9213  
COMPLAINT

UNITED STATES OF AMERICA,  
*Plaintiff,*

v.

STATE OF WASHINGTON,  
*Defendant.*

COMPLAINT FOR DECLARATORY  
JUDGMENT AND INJUNCTION

The United States of America, by Stan Pitkin, United States Attorney for the Western District of Washington, acting under authority of The Attorney General and at the request of the Secretary of the Interior, complains and alleges as follows:

## FIRST CLAIM FOR RELIEF

1. This Court has jurisdiction by reason of the fact that the United States is plaintiff. 28 U.S.C. § 1345.

2. The United States brings this action on its

own behalf and on behalf of the Puyallup Tribe of the Puyallup Reservation, the Nisqually Indian Community of the Nisqually Reservation, the Muckleshoot Indian Tribe of the Muckleshoot Reservation, the Skokomish Indian Tribe of the Skokomish Reservation, the Makah Indian Tribe of the Makah Indian Reservation, the Quileute Tribe of the Quileute Reservation, and the Hoh Tribe or Band of Indians which are tribes or communities of Indians recognized as such by the Secretary of the Interior.

3. The United States has entered into treaties with the tribes named in paragraph 2 as follows:

The Treaty of Medicine Creek on December 26, 1854, with the Puyallup, Nisqually and other Tribes, 10 Stat. 1132.

The Treaty of Point Elliott on January 22, 1855, with various tribes and bands including the Indians who now comprise the Muckleshoot Indian Tribe, 12 Stat. 927.

The Treaty of Point No Point on January 26, 1855, with the Skokomish and other Tribes, 12 Stat. 933.

The Treaty with the Makahs on January 31, 1855, 12 Stat. 939.

The Treaty of Olympia on July 1, 1855 and January 25, 1856, with the different tribes and bands of the Qui-naielt and Quil-leh-ute Indians, including the Hoh Tribe or Band of Indians, 12 Stat. 971.

Each of said treaties contains a provision securing to the Indians certain off-reservation fishing rights. The following provision from the Treaty of Medicine Creek is typical of these provisions:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, \* \* \* *Provided, however,* that they shall not take shellfish from any beds staked or cultivated by citizens, \* \* \* ."

Each of the tribes named has usual and accustomed fishing places within the western portion of the State of Washington, including, among others, the Nisqually River, the Puyallup River and Commencement Bay, the White River, the Green River, the waters of Hood Canal and the rivers flowing into said Canal, the Straits of Juan de Fuca, the Quileute River and its tributaries, and the Hoh River. Each of the tribes named has rights secured by said treaties to take fish, including the species commonly known as steel-head, at its usual and accustomed fishing places.

4. Subsequent to the execution of the treaties and in reliance thereon, the members of the tribes have continued to fish for subsistence and commercial purposes at the usual and accustomed places. Such fishing provided and still provides an important part of their subsistence and livelihood.

5. The rights of said tribes of taking fish at all usual and accustomed places guaranteed by said treaties are subject to regulation by the defendant only to the extent necessary for conservation. These rights do not derive from state authority and must be recognized and protected by the defendant. The

defendant's authority to restrict the exercise of such rights is different from and more limited than its authority to restrict the state-conferred fishing privileges of persons who are not the beneficiaries of such rights. Proper recognition and protection of the rights require that before restricting their exercise the defendant must (a) deal with the matter of the Indians' treaty fishing rights as a subject separate and distinct from that of fishing by others, (b) so regulate the taking of fish that the tribes and their members will be accorded an opportunity to take, at their usual and accustomed places by reasonable means feasible to them, a fair and equitable share of all fish which the defendant permits to be taken from any given run, and (c) establish that it is necessary (as distinguished from merely convenient) for conservation to impose the specifically prescribed restriction on the exercise of the treaty right.

6. The defendant has failed and refused to recognize and protect the tribes' treaty rights. It has, with limited exceptions, failed and refused to deal with fishing by the beneficiaries of such rights as a separate subject when formulating regulations to govern the taking of fish in the waters subject to the defendant's jurisdiction. It has, with limited exceptions, denied that such rights invest the beneficiaries with any privileges and immunities greater than those which the defendant chooses to accord citizens generally. It has dealt with Indian treaty rights as though they were state-conferred privileges, any

exercise of which the state is not only free to, but is required to, regulate to the same extent and in the same manner as it regulates fishing by persons not entitled to exercise said rights. In conformity with this premise, defendant, with limited recent exceptions, contends it has no authority to, and has refused to, recognize or allow any manner of exercise of the right, or its exercise during any time, at any place, or for any purpose the defendant does not allow other persons to take fish. It has failed and refused to attempt to so regulate fishing in waters subject to its jurisdiction as to accord the beneficiaries of such right an opportunity to catch, at their usual and accustomed places and by reasonable means feasible to them, a fair and equitable portion of the fish which are available for catching from a particular run consistent with adequate escapement for spawning and reproduction. It has not determined what specific restrictions must necessarily be imposed upon the exercise of the treaty rights in the interest of conservation and informed the beneficiaries thereof in advance of enforcement what those restrictions are.

It has so framed its statutes and regulations as in many instances to allow all the harvestable fish from given runs to be taken by those with no treaty rights before such runs ever reach the usual and accustomed fishing places to which the treaties apply.

Defendant has by statute and regulation totally

closed many of the usual and accustomed areas of said tribes to all forms of net fishing while permitting commercial net fishing elsewhere on the same runs of fish.

Defendant has by statute and regulation set aside one species of fish, the species commonly known as steelhead, for the exclusive use and benefit of a single category of persons, namely sportsmen, and has imposed limitations on the means by which, the purpose for which, and the numbers of which said species may be taken that are in derogation of the treaty rights of said tribes.

7. Defendant has not undertaken, or caused to be undertaken, any studies, research, or experimentation—or if it has, has not introduced the results thereof into any hearing or public proceeding at which state fishing laws or regulations were considered or enacted—of the extent to which it is necessary for the defendant to restrict the exercise of fishing rights secured to Indian tribes by treaties of the United States.

8. In devising, adopting and promulgating the regulations by which they authorize the taking of fish for commercial or sports purposes by persons subject to the state's jurisdiction, and in establishing and carrying out fishery management policies and programs and determining conservation objectives, the defendant and its officers and agents have not given recognition to, or made proper allowance for,

the rights secured to Indian tribes by treaties of the United States.

9. The defendant and various of its officers and agents claiming to act in their official capacities on behalf of the defendant, have seized nets and other property of members of the aforementioned tribes and have harassed, intimidated, and threatened said members or caused them to be arrested and prosecuted, for allegedly violating state laws or regulations pertaining to fishing for, taking of, or possession of, fish which were taken or sought to be taken by said members in the lawful exercise of rights secured by the treaties, and have confiscated or released fish belonging to said members and taken in the exercise of said rights, have interfered with, obstructed, and attempted to prevent the transportation or sale of such fish so taken by members of said tribes and have otherwise harassed and interfered with said members in the exercise of said rights. Defendant, its officers and agents, assert their intention to continue these actions. In so acting and threatening to act, the defendant, its officers and agents are acting wrongfully and in derogation of rights secured by the treaties.

10. As a result of the said wrongful acts of defendant, the tribes and their members are being unlawfully deprived of their treaty right, privilege, and immunity to fish at many of their usual and accustomed places and have suffered, and will con-



tinue to suffer, irreparable damage. The plaintiff, the tribes and members of the tribes, have no adequate remedy at law because

(a) the damages which have been and will be sustained are not susceptible of monetary determination;

(b) the right of the Indians to fish at their usual and accustomed places conferred by treaty with the United States is unique and should be specifically protected; and

(c) in the case of criminal prosecutions threatened by the defendant or its officers or agents purporting to act under the authority of the state statutes, these Indians have no remedy at all except at the risk of suffering fines, imprisonment and confiscation of property, involving a multiplicity of legal proceedings.

11. An actual controversy exists between the plaintiff on the one hand and the defendant on the other as to the nature and extent of the treaty fishing rights of the tribes named in this complaint and the attempted regulation thereof by the defendant.

## SECOND CLAIM FOR RELIEF

12. Plaintiff restates and re-alleges the allegations of paragraphs 1 through 11 of this complaint.

13. Statutes of the defendant enacted without regard to Indian treaty rights make it unlawful to use various types of appliances including a set net, a weir, or any fixed appliance within any waters of the state for the purpose of catching salmon (RCW 75.12.060) or to lay or use any net for the purpose

of taking fish which the defendant has classified as game fish, or lay or use any net capable of taking game fish except as permitted by regulation of the Department of Fisheries (RCW 77.16.060). Defendant's statutes also make it unlawful to spear, gaff or snag salmon except as may be authorized by the Director of Fisheries (RCW 75.12.070), to use reef nets except in limited areas specified by statute (RCW 75.12.160). Other statutes, including RCW 75.08.080, give the defendant's Director of Fisheries broad authority to regulate the taking of salmon, and give defendant's Game Commission broad authority to regulate the taking of steelhead and other "game fish" (RCW 77.12.040), which authorities have been exercised without proper regard for Indian treaty rights, make violation of provisions of defendant's fisheries or game codes or regulations punishable as a crime (RCW 75.08.260, RCW 77.16.020, RCW 77.16.030, RCW 77.16.040, and provide for seizure and forfeiture of gear used or held with intent to use unlawfully (RCW 77.12.100)). Nets and other items used or "had or maintained for the purpose of" taking game fish contrary to law or Game Commission rule or regulation are subject to summary seizure and destruction by game protectors "without warrant or process." (RCW 77.12.130). Among other restrictions, regulations of the defendant issued by said Director of Fisheries make it unlawful to fish for or possess food fish from any waters over which the State of Washington has jurisdiction

except as provided for in state statutes or in regulations of the State Department of Fisheries (WAC 220-20-010(1) and (2)). These regulations also make it unlawful to have an unattended gill net in the commercial salmon fishery (WAC 220-20-010(5)), or to place commercial food fish gear in any waters closed to commercial fishing (WAC 220-20-010(6)), or to attempt to take food fish by various specified means including gaffing, snagging, dip netting, spearing, and others, or to possess food fish so taken (with limited exceptions in connection with personal use angling) (WAC 220-20-010(11)), or to fish for or possess food fish taken contrary to provisions of any special season or emergency closed period prescribed in Chapter 220-28 of the Washington Administrative Code (WAC 220-20-010(16)), or to take salmon "for commercial purposes" i.e., by means other than angling—within three miles of any river or stream flowing into Puget Sound (WAC 220-20-015(2)), or within areas specified in WAC 220-47-020, or to fish for food fish for personal use by any means other than angling unless otherwise provided or possess fish so taken (WAC 220-56-020(2)). Various officers and agents of the defendant have stated their intention on behalf of the defendant to apply such laws and regulations to all Indians fishing at their Tribe's usual and accustomed places in the exercise of rights secured by their treaties and have arrested, cited for prosecution, and seized

gear of members of such Tribes for so fishing in violation of such laws and regulations.

14. Defendant's Director of Fisheries has promulgated regulations which give limited recognition to the treaty fishing rights of some of the Tribes named in paragraph 2 hereof. (Director of Fisheries Orders No. 866, 875, 885). Said regulations contain limitations and restrictions on the exercise of treaty rights that are not reasonable and necessary for conservation and are not the least restrictive which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes. Defendant's Director of Fisheries has failed and refused to promulgate regulations to provide recognition to, or permit exercise of, the treaty fishing rights of some Indian Tribes having treaty fishing rights, including the Muckleshoot Indian Tribe and the Skokomish Indian Tribe.

15. The effect of RCW 75.12.060 and 77.16.060 and the regulations referred to in paragraph 13 is to close permanently to the taking of food fish by any means other than angling, a substantial portion of the area which contains numerous and important usual and accustomed fishing places of the Tribes, while permitting commercial fishing in other areas on migratory fish runs which pass by such tribal fishing places. The defendant, its officers and agents, have failed to recognize and to provide sufficiently for the exercise of the treaty fishing rights of the Tribes,

and their members, at their usual and accustomed places which failure constitutes a denial of the treaty fishing rights and an unlawful and unreasonable discrimination in favor of those fishing commercially or for recreation and pleasure and against the Tribes and their members. Such action has not been and cannot be justified as necessary for the conservation of fish.

16. In devising and adopting the rules and regulations governing the taking of food fish for commercial purposes, the defendant has failed to give proper recognition or make adequate provision for the exercise of treaty fishing rights of Indians at their usual and accustomed places and has adopted regulations which discriminate against the taking of fish at the usual and accustomed places of the previously mentioned Indian Tribes in favor of those who take fish at other locations. In doing so the defendant is unlawfully discriminating against the exercise of Indian treaty fishing rights in the recognition and beneficial use of such treaty rights. Such discrimination results in irreparable damage to such Tribes and their members.

WHEREFORE, plaintiff prays that the Court:

1. ORDER, ADJUDGE, and DECREE that

(a) Each of the tribes named in this complaint owns and it may authorize its members to exercise a right derived from the laws and treaties of the United States to take fish at its usual and accustomed places,

which right is distinct from any right or privilege of individuals to take fish derived from common law or state authority, and the exercise of which is subject to state control only through such statutes or regulations as have been established to be necessary for the conservation of the fishery and which do not discriminate against the exercise of such right;

(b) Before defendant may regulate the taking and disposition of fish by members of said tribes at usual and accustomed fishing places pursuant to treaties between said tribes and the United States:

(i) It must establish by hearings preliminary to regulation that the specific proposed regulation is both reasonable and necessary for the conservation of the fish resource. In order to be necessary, such regulations must be the least restrictive which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes; the burden of establishing such facts is on the state.

(ii) Its regulatory agencies must deal with the matter of the Indians' treaty fishing as a subject separate and distinct from that of fishing by others. As one method of accomplishing conservation objectives it may lawfully restrict or prohibit non-Indians fishing at the Indians' usual and accustomed fishing places without imposing similar restrictions on treaty Indians.

(iii) It must so regulate the taking of fish that, except for unforeseeable circumstances beyond

its control, the treaty tribes and their members will be accorded an opportunity to attempt to take, at their usual and accustomed fishing places, by reasonable means feasible to them, a fair and equitable share of all fish which it permits to be taken from any given run.

2. Declare RCW 75.12.060, RCW 75.12.070, RCW 77.08.020, RCW 77.12.130, RCW 77.16.040, 77.16.060, WAC 220.20.010, WAC 220-20-015 (2) and WAC 220-47-020 null and void insofar as they deny or restrict the right of members of the Tribes named in this complaint, acting under tribal authorization, to take fish for subsistence and commercial purposes at their tribe's usual and accustomed fishing places or to possess or dispose of fish so taken.

3. Declare that the defendant, its officers, agents, and employees may not apply the provisions of RCW 75.08.260, RCW 77.12.100, 77.16.020, and 77.16.030 in such manner as to prevent or restrict members of the tribes named in paragraph 2 hereof from taking fish for subsistence and commercial purposes at their tribe's usual and accustomed fishing places or to possess or dispose of fish so taken without previously having established that the imposition of such specific restriction is necessary for the conservation of fish and does not discriminate against the taking of fish pursuant to such treaty right.

4. Enjoin the defendant, its officers, agents and employees from enforcing the provisions of RCW



75.12.060, RCW 75.12.070, RCW 77.08.020, RCW 77.12.130, RCW 77.16.040, RCW 77.16.060, WAC 220.20.010, WAC 220-20-015(2) and WAC 220-47-020 in such manner as to prevent or restrict members of the said tribes from taking fish at their usual and accustomed places in accordance with tribal authorization pursuant to the treaties between those tribes and the United States.

5. Enjoin the defendant, its officers, agents and employees from enforcing the provisions of state laws or regulations in such manner as to prevent or restrict members of said tribes from taking fish at their usual and accustomed places in accordance with tribal authorization pursuant to the treaties between said tribes and the United States without previously having established that the imposition of state regulation is necessary for the conservation of fish and does not discriminate against the taking of fish pursuant to such treaty right.

6. Grant such further and additional relief as the plaintiff may be entitled to.

7. Award plaintiff the costs of this action.

8. Retain jurisdiction of this cause for the purpose of enforcing or supplementing the judgment of this Court.

DATED this 18th day of September, 1970, at Seattle, Washington.

/s/ Signature Affixed  
STAN PITKIN

United States Attorney  
Western District of Washington

APPENDIX "B-1"

STAN PITKIN

*United States Attorney*

STUART F. PIERSON

*Assistant United States Attorney*

1012 United States Courthouse

Seattle, Washington 98104

(206) 442-4735

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,  
*Plaintiff,*

vs.

THE COMMITTEE TO SAVE OUR FISH, a corporation;  
RALPH M. THORPE, JR.; LEONARD OSTRUS; JACK  
CARRAIDO; RAY SCHWERZLER; WALT GUTOSKI;  
and the STATE OF WASHINGTON,  
*Defendants.*

CIVIL ACTION  
39-71C3

COMPLAINT

THE UNITED STATES OF AMERICA, by  
Stan Pitkin, United States Attorney for the Western  
District of Washington, and Stuart F. Pierson, As-  
sistant United States Attorney, its attorneys, alleges:

1. This is a complaint for declaratory judgment  
in a case of actual controversy, brought pursuant to  
28 U.S.C. § 2201 and Rule 57 of the Federal Rules  
of Civil Procedure, and for such further relief as the  
interests of justice may require.

2. Jurisdiction of this Court is based upon 28 U.S.C. § 1345.

3. Defendant COMMITTEE TO SAVE OUR FISH (hereinafter "the Committee") is a Washington State corporation, doing business and operating in the Western District of Washington. Defendant RALPH M. THORPE, JR. is president and a director of the Committee and he resides within the Western District of Washington. Defendant LEONARD OSTRUS is vice-president and a director of the Committee and he resides within the Western District of Washington. Defendant JACK CARRAIDO is secretary and a director of the Committee and he resides within the Western District of Washington. Defendant RAY SCHWERZLER is treasurer and a director of the Committee and he resides within the Western District of Washington. Defendant WALT GUTOSKI is a director of the Committee and he resides within the Western District of Washington.

4. The Committee is an organization established for the purpose of conserving and preserving steelhead salmon in the Puyallup, Nisqually, and Green Rivers, and for the purpose of promoting, dramatizing and protecting claims of non-Indians to fish in these waters within the State of Washington.

5. Pursuant to the aforesaid purposes, the Committee, by and through its president, defendant Ralph M. Thorpe, Jr., has taken action designed to establish its claim (a) that persons who are not

Puyallup Indians may fish on the Puyallup River to the same extent as, and with no greater restrictions than those placed upon Puyallup Indians, and (2) that the State of Washington is obliged to enforce its fishing regulations against Puyallup Indians no matter where they fish within the State. This action of the Committee has taken various forms.

6. On or about March 26, 1971, the United States Department of Interior, by its Acting Associate Solicitor, issued a memorandum setting forth its opinion that the Puyallup Indian Reservation was currently defined by those boundaries established by Executive Orders of January 20, 1857 and September 6, 1873. On or about August 11, 1971, that Department issued a supplemental memorandum stating the following opinion:

1. The right to fish within the exterior boundaries of the Puyallup Reservation, as established in 1873, and as those boundaries continue to exist today for federal and tribal purposes, must be exclusive. It was exclusive when the reservation was established, *Moore v. United States, supra*, and *Mason v. Sams, supra*; since the tribe has not relinquished its right, and since the Congress has not terminated or modified the right, it remains an exclusive right today. If an act of Congress explicitly terminating a reservation does not terminate a hunting right merely implied to be concomitant thereto (*see Menominee Tribe v. United States*, 391 U.S. 404 (1968)), *a fortiori* acts of Congress neither dissolving nor diminishing a reservation for purposes of tribal jurisdiction do not terminate a fishing right

within the exterior boundaries of a reservation established under a treaty.

2. The State of Washington may not exercise any authority over Puyallup Indians fishing on the Puyallup Reservation because the bed of that river within those boundaries continues to be held in trust by the United States for the benefit of the tribe and therefore constitutes an area over which the laws of the state have not, under RCW 37.12.010 (see our March memorandum), been extended, and could not, under the Act of August 15, 1953, as amended, be extended (without the consent of the tribe).

3. Regarding the question of the extension of the state's fishing regulations to non-Puyallup Indians under the Act of August 15, 1953, or under RCW 37.12.010: To the extent that an answer must depend on an interpretation of the state statute, we do not respond to the question; to the extent that an answer must depend on an interpretation of the federal act, we conclude that the state possesses no more authority to regulate fishing by non-Puyallup Indians within the boundaries of the Puyallup Reservation than it does to regulate such fishing by Puyallup Indians, when fishing by such Indians has been permitted by the Puyallup Tribe. See *Donahue v. California Justice Court*, 93 Cal. Rptr. 310 (Ct. App. 1971).

7. Upon information and belief, on or about August 19, 1971, the Committee, by its president, defendant Ralph M. Thorpe, Jr., stated its intention to protest unregulated Indian net fishing on the Puyallup River, by leading a group of people, not Puyallup Indians, onto the Puyallup River to fish with set nets at places within the boundaries of the

Puyallup Reservation as recognized by the United States Department of Interior in the aforesaid memoranda.

8. The intended actions of the Committee, as described in paragraph 7 herein are designed to require and to oblige appropriate Washington State authorities to assume jurisdiction over and regulation of, fishing by all persons on the Puyallup River, including Puyallup Indians as well as those not members of that tribe, within the boundaries of the Puyallup Reservation as recognized by the United States Department of Interior in the aforesaid memoranda.

9. Defendant State of Washington has its capital at Olympia within the Western District of Washington.

10. By Washington state statutes and regulations, and by Washington state court decisions, the State of Washington has authority under state law to regulate fishing by all persons on the Puyallup River, within the boundaries of the Puyallup Reservation as recognized by the United States Department of Interior in the aforesaid memoranda.

11. The aforesaid authority of the State of Washington under state law is in direct conflict with the federally protected rights of the Puyallup Indian Tribe to exclusive fishing rights and regulations thereof upon the Puyallup River flowing through the Puyallup Indian Reservation and over Puyallup Indian lands.

12. An actual controversy within the jurisdiction of this Court exists with respect to the matters stated hereinabove between the plaintiff and the defendants.

13. It is in the public interest for this Court to determine at the earliest practicable date the rights of the parties herein, so that all persons concerned with fishing on the Puyallup River can adjust and determine their actions without disturbance, disruption or interference with the rights of others.

WHEREFORE, plaintiff prays for a judgment declaring the rights and other legal relations of the parties hereto, and declaring specifically that the Puyallup Indian Tribe and its authorized representatives have exclusive right to, and regulation of, all fishing on or in the Puyallup River within the Puyallup Indian Reservation.

PLAINTIFF FURTHER PRAYS for an order permanently restraining and enjoining the defendants, their agents, successors in interest, and all other persons acting in concert or participation with them from in any manner or form assuming jurisdiction over, or regulation of, fishing on the Puyallup River within the Puyallup Indian Reservation; and from in any manner or form interfering or inhibiting the exercise of jurisdiction over, and regulation of, fishing on the Puyallup River within the Puyallup Indian Reservation by The Puyallup Indian Tribe or its authorized representatives.



PLAINTIFF FURTHER PRAYS that this Court order a speedy hearing on the merits of this action and advance it on the calendar pursuant to Rule 57 of the Federal Rules of Civil Procedure.

DATED this 20th day of August, 1971.

/s/ Signature Affixed

STAN PITKIN

*United States Attorney*

/s/ Signature Affixed

STUART F. PIERSON

*Assistant U. S. Attorney*

APPENDIX "B-2"

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

No. 39-71C3

MEMORANDUM DECISION

UNITED STATES OF AMERICA, *Plaintiff,*

vs.

THE STATE OF WASHINGTON, *Defendant.*

The United States Government seeks to enjoin the State of Washington from the enforcement of certain laws bearing on the methods by which the steelhead trout or fish may be captured on the Puyallup River in Pierce County.

In turn, the State of Washington moves this Court for an order declaring that it possesses the

power to regulate the taking of steelhead fish by Indian members and descendants of the Reorganized Puyallup Tribe from the Puyallup River.

This controversy has been before the Supreme Court of the United States and numerous intermediate courts on prior occasions. In describing this controversy, Justice William O. Douglas of the Supreme Court of the United States said in the case of *Puyallup Tribe v. Department of Game of the State of Washington* and the *Nisqually Tribe v. Department of Game of the State of Washington*, 391 U.S. 392:

"These cases present a question of public importance which involves in the first place a construction of the Treaty of Medicine Creek made with the Puyallup and Nisqually Indians in 1854 (10 Stat. 1132) and secondly the constitutionality of certain conservation measures adopted by the State of Washington allegedly impinging on those treaty rights."

It is interesting to note that both the United States Government and the State of Washington have asked the Supreme Court of the United States to again consider the questions that were presented to that Court. In other words, both have petitioned certiorari. Whether or not the Supreme Court of the United States will reconsider its opinion is only conjecture.

There is no doubt of the constitutionality of the laws of the State of Washington enacted by the State Legislature empowering the Department of Game to regulate the taking of steelhead fish by both non-

Indians and Indians off reservations. The Court has unequivocally passed on that question. At page 398, Justice Douglas said:

"The treaty right is in terms the right to fish 'at all usual and accustomed places.' We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the *manner* in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the 'usual and accustomed places' in the '*usual and accustomed*' manner. But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.' Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. The right to fish 'at all usual and accustomed' places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. Act of June 2, 1924, 43 Stat. 253, as superseded by § 201(b) of the Nationality Act of 1940, 8 U.S.C. § 1401 (a) (2). But the manner of fishing, the size of the take, the restriction of "commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."

But the United States Government contends that in the instant case the reservation boundaries

that existed in the year 1873 encompassing approximately 18,000 acres of land and some seven miles of the Puyallup River from a point a short distance from the mouth of said river and extending some seven miles upstream entitles the Indians to fish without restriction by the State because the part of the river described is within the present boundaries of the Puyallup Indian Reservation and upon which the Indians have unrestricted right to fish.

The Government contends that the Supreme Court of the United States did not determine the present claim of the United States that fishing within the 1873 boundaries is reservation fishing, vis-a-vis, non-reservation fishing because the issue was never presented to that Court.

At the request of this Court, the brief of the Puyallup Tribe prepared by the attorney for the Tribe was obtained so that this Court could determine the question of whether or not the issue had been presented to the Supreme Court. A reference to the brief shows that it was, and at page 43 of said brief and the first paragraph thereof contains the following language:

"The Indian petitioners submit that unless and until the Congress enacts a Termination Act terminating federal supervision over the Puyallup Indian reservation or constricting the boundaries of the original Puyallup Indian reservation, the original boundaries mark the area within which the fishing rights reserved to them by the Treaty of Medicine Creek may be exer-

cised without restriction by state laws or regulations."

It is true that in the footnote to the opinion of the Supreme Court of the United States previously referred to Justice Douglas says that the Court does not reach the issue of the present boundaries of the Puyallup Reservation, but for whatever reason the Court made that decision, the fact remains that the issue was presented.

This Court is not required to determine the conservation issue at this time. That is posed in other cases concerning the "prohibition of the use of set nets" in these fresh waters as a "reasonable and necessary conservation measure." Eventually this Court may be required, as directed by the Supreme Court of the United States, to make ultimate findings on the conservation issue and also cover the issue of equal protection implicit in the phrase "in common with."

The State of Washington and its Department of Game, pursuant to the statutory regulation regarding the taking of the said steelhead fish, may preclude the taking of said fish by any other means than the hook and line in the interest of conserving the resource.

Therefore, the motion of the United States Government to enjoin the State of Washington and its Department of Game from interfering with the taking of said steelhead fish from the Puyallup River

by Indians enrolled in the Reorganized Puyallup Tribe is denied, and the motion of the State of Washington declaring said State to possess the power to regulate the taking of steelhead fish on the Puyallup River by Indian descendants of enrolled members of the Reorganized Puyallup Tribe or members of said Reorganized Puyallup Tribe is granted, and that said State, pursuant to its laws and the rules and regulations by its Department of Game shall have said power provided that said rules and regulations for the taking of said steelhead fish apply equally to all persons, Indians and non-Indians alike.

Further, the said order applies to all areas of the Puyallup River including the navigable portion thereof which is stipulated to by the parties as extending to and beyond the upstream area where the United States Government contends that the Puyallup Indian Reservation boundaries of 1873 continue to exist, and the Court finds as a fact that said reservation boundary does not continue to exist as contended by the United States.

IT IS SO ORDERED.

DONE BY THE COURT this 29th day of January, 1973.

WILLIAM N. GOODWIN

*United States District Judge*

APPENDIX "B-3"  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

No. 39-71C3

ORDER

UNITED STATES OF AMERICA,  
*Plaintiff,*

vs.

THE STATE OF WASHINGTON,  
*Defendant.*

The Court, in its Memorandum Decision, has rejected the contention of the United States that the 1873 boundaries of the then existing Puyallup Indian Reservation still exist.

It has been twice held to the contrary. *United States v. Kopp*, 110 Fed. 160 (1901). Subsequent to that decision, the Supreme Court of Washington has reached the same conclusion in *Goudy v. Meath*, 38 Wn. 126, 80 Pac. 295; *State v. Smokalem*, 37 Wn. 91, 79 Pac. 603.

The Puyallup Allotment Act, 27 Stat. 63; the appointment of a commissioner to superintend sale of allotments, 30 Stat. 87, the consent of the United States to the removal of restrictions upon alienation by Puyallup Indians of their allotted lands, 33 Stat. 565; the legislative intent expressed in the House



Committee Report No. 301, 58th Congress, Second Session (1904), in combination resulted in the almost total divestiture of the land within the 1873 reservation boundaries by the Indians. The Indian cemetery property was transferred by the Indian descendants of the members of the former Puyallup Tribe to certain individual trustees. The United States no longer supervised or claimed any right to supervise the activities of the said trustees in the performance of their duties as trustees of the said Cemetery Trust. Ex. JX 19, recorded March 25, 1908, dated in 1906.

The Indian Agency property, which no longer was the site of the Indian Agency and the home of the supervisor, was to be sold and the proceeds distributed to the tribal descendants. In 1948 the channel of the Puyallup River was altered by the United States Corps of Engineers to prevent the annual devastating floods that inundated the lands in the Puyallup River Valley. This was a part of what is known as the Mud Mountain Dam project, and the Mud Mountain Dam was constructed to regulate the flow of the Puyallup River during the periods of heavy runoff caused by melting snow in the Cascade Mountains where the river and its tributaries have their source.

The bed of the river as it existed in 1873 and the river channel within the 1873 boundaries of the reservation have been materially changed by this flood control project.

The unrestricted sale of the allotted lands has resulted in the population growth and establishment of incorporated and unincorporated towns, industrial complexes, a municipal corporation titled The Tacoma Port Authority, and many other commercial and residential areas on the land now claimed to be within the boundary of the Puyallup Indian Reservation. An examination of the relief map exhibited by the Government shows the extent of the development of the areas.

Of the 18,000 acres more or less lying within the Government's proposed reservation boundary, only approximately 30 acres are presently claimed to be land held by the United States in trust for the reorganized tribe.

The evidence supports the conclusion that the Puyallup Indian Reservation neither legally, actually, nor practically exists, nor is there any valid reason for its existence.

It is claimed by the United States that the members of the Reorganized Tribe have some claim to the present bed of the Puyallup River, and that water flowing over the river bed flows over reservation land, and that fish swimming in the water flowing over the reservation land may be captured by the Indians without regard to state conservation laws.

It is agreed that the Puyallup River is a navigable stream and title to the land normally is in the

United States, but assuming without deciding that by establishment of the reservation and subsequent alienation of the lands bordering the river are without reference to the bed of the river, and in the instrument the Indian allottee-grantor retains some interest in the riverbed, does it follow that the combined interest of all the riparian Indian allottees who alienated their allotments but did not transfer their riparian interests revitalizes the deceased reservation so that the bed of the river is now reservation land held in trust by the United States for the benefit of the descendants of the members of the original Puyallup Tribe or the members and descendants of the members of the Reorganized Puyallup Tribe? The common sense conclusion dictates that wherever title to the land may lay, the bed of the river is not an Indian reservation, and that the State of Washington owns the fish that swim in this navigable stream and may control by its conservation laws the manner in which said fish may be taken. Assuming without deciding that the members of the Reorganized Tribe have some claim to the present bottom of the Puyallup River, it does not follow that the riverbed is the Indian Reservation. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), decided title to a riverbed but did not reestablish or revive an Indian reservation that had been extinguished by legislation. Act of 1906, 44 Stat. 148.

The Puyallup tribal right to unrestricted fishing on the waters of the Puyallup River that flowed

through the 1873 reservation boundaries was extinguished when the reservation was extinguished and reorganization of the tribe did not revive it.

IT IS SO ORDERED.

DONE BY THE COURT this 31st day of January, 1973.

WILLIAM N. GOODWIN  
*United States District Judge*

APPENDIX "B-4"

STAN PITKIN  
*United States Attorney*

STUART F. PIERSON  
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1012 United States Courthouse  
Seattle, Washington 98104  
(206) 442-7970

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

No. 39-71C3  
NOTICE OF APPEAL

UNITED STATES OF AMERICA  
*Plaintiff,*

v.

THE STATE OF WASHINGTON,  
*Defendant.*

NOTICE is hereby given that the United States hereby appeals to the United States Court of Appeals

for the Ninth Circuit Court of Appeals from the Memorandum Decision of this Court entered in the above-captioned proceeding on January 29, 1973, and this Court's Order of January 31, 1973, which Decision and Order constitute a final judgment on the merits of this case after trial.

DATED this 1st day of February, 1973.

Respectfully submitted,

/s/ Signature Affixed

STAN PITKIN

*United States Attorney*

/s/ Signature Affixed

STUART F. PIERSON

*Assistant U. S. Attorney*

### CERTIFICATE OF MAILING

I certify that I mailed a copy of the foregoing document to which this certificate is attached, to the attorneys of record, defendant, on the 1st day of Feb., 1973.

UNITED STATES ATTORNEY

By S. F. PIERSON /

**In the Supreme Court of the United States**

**OCTOBER TERM, 1972**

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**No. 72-481**

**DEPARTMENT OF GAME OF THE STATE OF  
WASHINGTON, PETITIONER**

**v.**

**THE PUYALLUP TRIBE**

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**No. 72-5437**

**RAMONA C. BENNETT, PETITIONER**

**v.**

**DEPARTMENT OF GAME OF THE STATE OF WASHINGTON**

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**ON PETITION AND CROSS-PETITION FOR WRITS OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE OF WASHINGTON**

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**MEMORANDUM FOR THE PUYALLUP TRIBE**

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This case concerns the validity of the application to the Puyallup Tribe of Indians of regulations of the State of Washington prohibiting net fishing for steel-head trout. The case was previously before this Court in 1968, at which time this Court affirmed the judgment of the court below remanding the case to the trial court for further findings of fact. 391 U.S. 392.

Essentially, the issues to be decided on remand were whether the Washington regulations prohibiting the taking of steelhead trout by net were reasonably required in the interest of conservation, gave adequate consideration to the rights granted the Tribe by treaty, and did not discriminate against the Indians. On remand, the trial court, after a hearing, dissolved the injunction prohibiting Puyallup Indians from taking fish by net. It held that adequate criminal sanctions were available to prevent such fishing and that in any criminal case the State would have the burden of proving that the regulations in effect at that time were reasonable and necessary for the conservation of fish.

Both plaintiffs and defendants appealed to the Supreme Court of the State of Washington. That court held (Pet. App.) that the regulations prohibiting fishing by net for steelhead trout for the year 1970 were valid as applied to the Puyallup Tribe, that new fishing regulations for the Puyallup Tribe must be made each year supported by facts and data that show the regulation is necessary for the conservation of the species of fish in question, and that the injunction against the Tribe should be reinstated subject to modifications consistent with the opinion of the court.

1. The petition for a writ of certiorari of the Department of Game of the State of Washington argues that the Supreme Court of the State of Washington has erred in requiring the Department of Game even to consider whether different fishing regulations should apply to off reservation fishing by treaty-protected Indians than apply to fishermen in general.



The Department also challenges the decision of the Supreme Court of Washington as inconsistent with an earlier decision of the same court.

That the State, in establishing its fishing laws, must give separate consideration to Indians having off-reservation fishing rights under treaties such as the treaty of Medicine Creek was made clear in this Court's previous decision in this case. *Puyallup Tribe v. Department of Game*, 391 U.S. at 397. The Court, quoting *United States v. Winans*, 198 U.S. 371, held that "to construe the treaty as giving the Indians 'no rights but such as they would have without the treaty' (198 U.S. 380) would be 'an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.'" Accordingly, the court below on remand properly rejected the Department of Game's contrary contention. And, since this Court's previous decision concerning the federal treaty rights involved here is controlling, the State's further contention that the decision below is inconsistent with a prior decision of the same state court is immaterial—and would not, in any event, warrant review by this Court.

2. In No. 72-5437, Ramona C. Bennett seeks a writ of certiorari only in the event that this Court grants the petition for a writ of certiorari of the Department of Game (No. 72-481). The Solicitor General, on behalf of the Puyallup Tribe, has also filed a petition for a writ of certiorari in this case and, for the reasons set forth in that petition, we support the conditional cross-petition of Ramona C. Bennett.

For the reasons set forth above it is respectfully submitted that the petition for a writ of certiorari in No. 72-481 should be denied, but if that petition is granted, the conditional cross-petition of Ramona C. Bennett in No. 72-5437 should also be granted.

ERWIN N. GRISWOLD,  
*Solicitor General.*

NOVEMBER 1972.

IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

October Term, 1972

No. 72-481

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,

v.

THE PUYALLUP TRIBE, INC., et al.,

No. 72-746

THE PUYALLUP TRIBE, INC., et al.

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON.

ON WRITS OF CERTIORARI  
TO THE SUPREME COURT OF THE  
STATE OF WASHINGTON

**BRIEF FOR THE  
WASHINGTON DEPARTMENT OF GAME,  
APPELLANT**

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TO THE SUPREME COURT OF THE  
STATE OF WASHINGTON

BRIEF FOR THE  
WASHINGTON DEPARTMENT OF GAME,  
APPELLANT

OPINIONS BELOW

The Washington Supreme Court rendered its opinion on the remand proceeding entitled *Department of Game of Washington v. Puyallup Tribe*, 80 Wn.2d 561, 497 P.2d 171 on May 4, 1972. Petitions for rehearing were timely filed and denied. The remittitur by the Washington Supreme Court is printed at page 30 of the remand appendix, hereinafter designated as Re. A. This Court granted and consolidated the writs of certiorari filed on behalf of the Washington Department of Game and the Federal Government on March 19, 1973.

## JURISDICTION

The opinion of the Washington Supreme Court became its final judgment on June 23, 1972. The petition for writ of certiorari of the Washington Department of Game was filed on September 21, 1972, and was granted on March 19, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

## QUESTIONS PRESENTED

- I. Whether the Equal Protection concepts implicit in the Treaty phrase " . . . in common with all citizens of the Territory . . ." means that treaty Indians must abide by state conservation laws and regulations when they engage in fishing activities in off-reservation waters?
- II. Whether the legislature of the State of Washington has the constitutional authority to classify steel-head trout as a game fish and thus preclude any commercial taking or dealing in that species by treaty Indians in off-reservation waters?

## THE TREATY AND STATUTES INVOLVED

The Treaty involved is known as the *Treaty of Medicine Creek*, 10 Stat. 1132.

Article III provides:

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, . . .

The statutes involved are those of the State of Washington concerning fishery resource conserva-



tion by regulation of the time, place, and manner of fishing. Anadromous fish are the subject matter of this litigation. The management responsibilities for anadromous fish has been legislatively defined to include all species of salmon as food fish and steelhead trout as game fish.<sup>1</sup> Revised Code of Washington 77.16.060 provides:

It shall be unlawful for any person to lay, set, use, or prepare any drug, poison, lime, medicated bait, nets, fish, berries, formaldehyde, dynamite, or other explosives, or any tip-up, snare or net, or trot line, or any wire, string, rope, or cable of any kind, in any of the waters of this state with intent thereby to catch, take or kill any game fish. It shall be unlawful to lay, set or use a net capable of taking game fish in any waters of this state except as permitted by regulation of the department of fisheries: *Provided*, That persons may use small landing nets or under written permit issued by the director may use nets or seines in the taking of nongame fish.

Any person violating any of the provisions of this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

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<sup>1</sup>The Department of Game has management responsibilities for steelhead trout and the Department of Fisheries for salmon. Revised Code of Washington Title 75 and Revised Code of Washington Title 77. Steelhead trout may only be taken by hook and line under regulations promulgated by the Department of Game.

Revised Code of Washington 75.12.280 provides:

It shall be unlawful for any person to install, use, operate, or maintain within any waters of the state any monofilament gill net webbing of any description for the purpose of catching salmon, and it shall be unlawful to take salmon by any such means or with such gear.

Volume 5, Washington Administrative Code, Section 232-12-340 provides:

It shall be unlawful for any person to snag, spear, trap, shoot, or attempt to snag, spear, trap or shoot any game fish. No person shall fish for game fish in any other manner than with one line or rod held in the hand, and that such line or rod shall be under his immediate and absolute control. For the purpose of this regulation a hook means one single, double or treble fish hook. Any fishing line may have attached thereto any number of flashers or blades, but no more than two hooks, flies or artificial lures, or a combination of same. Artificial lures may have attached thereto any number of hooks: PROVIDED, That fresh water ling cod may be taken from Lake Palmer in Okanogan County, Lake Kachess, Keechelus and Cle Elum in Kittitas County with no more than one set line having attached thereto any number of hooks. Any set line must have attached an indestructible tag with the true name and address of the owner in legible English.

#### STATEMENT OF THE CASE

**(1) Resume of Prior Pleadings**

The complaint initiating these proceedings was

originally filed on November 12, 1963. (Rs. A. 5)<sup>2</sup> On January 12, 1967, the Washington Supreme Court rendered its first opinion. *Puyallup Tribe v. Department of Game*, 70 Wn.2d 245, 422 P.2d 754 (1967). (Rs. A. 39) On May 27, 1968, this Court rendered its original opinion entitled *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392. On August 7, 1969, a supplemental petition was filed in the trial court initiating the remand proceeding. (Re. A. 6) The remand trial occurred from September 21, 1970, through September 25, 1970. On December 30, 1970, the trial court entered its Findings of Fact and Conclusions of Law and Decree. (Re. A. 21). On May 4, 1972, the Washington Supreme Court rendered its opinion entitled *Department of Game of Washington v. Puyallup Tribe*, 80 Wn.2d 561, 497 P.2d 171. This Court granted and consolidated writs of certiorari filed on behalf of the Washington Department of Game and the Federal Government on March 19, 1973.

## (2) Statement of Facts

The Washington Department of Game has an extensive statutory (Revised Code of Washington Title 77) and regulatory (Volume 5, Washington Administrative Code, Section 232) system for management of the game fish resource for public recreational enjoyment. In order to maximize the public recreational enjoyment of this valuable natural resource, the Washington Department of Game has

<sup>2</sup>The original record in *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968) is designated as Rs. The remand record is designated Re.

assumed the responsibility for enhancement of steelhead resources in waters of the state. To this end, the Department has expended large sums of public monies;<sup>3</sup> (1) for construction and operation of artificial steelhead rearing facilities and associated stream planting programs, (2) for construction of fish passage facilities over or around obstacles in the various rivers, (3) to establish a research team of qualified fish biologists to study and make recommendations concerning problems of conservation, perpetuation and enhancement of the steelhead trout resource. (Re. A. 33). Within the State of Washington, commercial fishing or commercial dealings in steelhead trout is prohibited. (Re. A. 51). These laws and regulations completely prohibit any commercial net fisheries for steelhead trout in any waters of the state.<sup>4</sup>

A basic description of the life cycle of anadromous fish and fishing regulations is contained in *Puyallup Tribe v. Department of Game*, 391 U.S. 392 at 395-396.

Over 50 percent of all steelhead trout presently caught in the sport fisheries in the State of Washing-

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<sup>3</sup>The Washington Department of Game does not operate out of the general fund of the State of Washington. It is a dedicated fund agency and operates on revenues derived from sport fishing and hunting license sales plus certain monies made available through federal legislation. See: Revised Code of Washington Title 77.12.190, the Dingel-Johnson Act, 16 U.S.C. 777-777(k) (1950), and the Anadromous Fish Act, 16 U.S.C. 757.

<sup>4</sup>By virtue of the Columbia River Compact, 40 Stat. 515, both Washington and Oregon exercise concurrent jurisdiction over fishing activities in the Columbia River. Under Oregon law, steelhead trout are commercial fish until they enter tributary streams of the Columbia River in Oregon. Therefore, there is presently existing a commercial fishery for steelhead on the Columbia, but those steelhead may only be lawfully landed in the State of Oregon.

ton are the result of the Washington Department of Game's artificial propagation and planting programs. (Re. A. 36)

The value of a steelhead on the commercial market in Oregon is approximately 38c per pound. (Re. A. 40-41) Its value as a sport caught fish, in terms of its contribution to the economy of the State of Washington, is approximately \$60. (Re. A. 41) A direct comparison between the value of a sport versus a commercially taken steelhead does not, of course, take into account the recreational or aesthetic values associated with the sport angling activity itself. (Re. A. 54)

Off-reservation waters provide the only locations where sport fishermen may reasonably expect to catch a steelhead trout with hook and line. The success of a hook and line fishery for steelhead in salt waters is minimal. (Re. A. 64) A direct interference with the ability of the sport angler to attempt to fish for steelhead trout in off-reservation fresh water streams of the State of Washington would occur should treaty Indians be permitted to place their nets in these same locations. (Re. A. 64)

Populations of steelhead trout constitute approximately five percent of the total anadromous fish resource of the State of Washington. Their limited numbers do not lend themselves to commercial exploitation. (Re. A. 55)

## SUMMARY OF ARGUMENT

- I. **Whether the Equal Protection concepts implicit in the Treaty phrase " . . . in common with all citizens of the Territory . . ." means that treaty Indians must abide by state conservation laws and regulations when they engage in fishing activities in off-reservation waters?**

This Court observed in *Puyallup Tribe v. Department of Game, supra*, at pp. 402-403:

When the case was argued here, much was said about the *pros* and the *cons* of that issue. (conservation) Since the state court has given us no authoritative answer to the question, we leave it unanswered and only add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase "in common with." (*Insert by author*)

This Court has consistently held that a state, under its police powers, may apply its law to all citizens regardless of ancestry and without discrimination, outside areas of federal or Indian jurisdiction. This proposition is predicated upon the rationale of the "Equal Footing Doctrine" and upon the Admission to Statehood Acts. *Ward v. Racehorse*, 163 U.S. 504 (1896); *Kake v. Egan*, 369 U.S. 60 (1962); *Mescalero Apache Tribe v. Franklin Jones, et al.*, 41 L.W. 4451, U.S. (March 27, 1973)

This Court has also consistently held that a state may apply its conservation laws to Indians when engaging in off-reservation fishing activities on the theory of protection of this valuable natural resource

which belongs to all the people. *Geer v. Connecticut*, 161 U.S. 519 (1896); *Tulee v. Washington*, 315 U.S. 681 (1942); *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968).

This proposition is further supported by the fact that the "in common with all citizens" language in Article III of the *Treaty of Medicine Creek*, *supra*, appears in another context in the *Treaty with the Yakima*, 12 Stat. 951. Article III of the *Yakima Treaty* provides in relevant part:

. . . as also the right, in common with citizens of the United States, to travel upon all public highways.

Any suggestion that the state has the burden of establishing that the application of its traffic laws to Indians engaging in off-reservation travel upon the public highways is reasonable and necessary for the public safety in each given instance is absurd. Yet such an interpretation of the *Yakima Treaty* provision, *supra*, must necessarily follow should this Court adopt the contentions of respondents.

**II. Whether the legislature of the State of Washington has the constitutional authority to classify steelhead trout as a game fish and thus preclude any commercial taking or dealing in that species by treaty Indians in off-reservation waters?**

Alternatively, the Washington Department of Game submits that there is a rational basis upon which the legislature of the State of Washington may classify steelhead trout as a game fish and thus pre-



clude commercial netting or dealing in that species. As this Court observed in *Puyallup Tribe v. Department of Game of Washington* at p. 398:

The treaty right is in terms the right to fish "at all usual and accustomed places." We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the *manner* in which the fishing may be done and its purpose, *whether or not commercial*, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the "usual and accustomed places" *in the usual and accustomed* manner. But the treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one "in common with all citizens of the Territory." Certainly the right of the latter may be regulated. And *we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State.* (Emphasis supplied)

The state legislative classification of steelhead trout as a game fish is reasonable and meets the criteria of this Court as set forth above.

## ARGUMENT

- I. Whether the Equal Protection concepts implicit in the Treaty phrase " . . . in common with all citizens of the Territory . . ." means that treaty Indians must abide by state conservation laws and regulations when they engage in fishing in off-reservation waters?

Under the Constitution, it is the state and not the Federal Government which is the sovereign power which owns the fish as the representative of and for the benefit of all citizens. *Geer v Connecticut*, 161 U.S. 519 (1896). This common law principle was affirmed by the legislature of the State of Washington in RCW 77.12.010:

The wild animals and wild birds in the state of Washington and game fish in the waters thereof are the property of the state.

*Ward v. Racehorse*, 163 U.S. 504 (1896) constitutes the leading decision articulating the concept of "Equal Footing" in relation to Indian treaties. The issue in this case was a treaty provision with the Bannock tribe which, the Indian tribe argued, granted them immunity from the application of the Wyoming hunting laws in off-reservation areas. This Court squarely rejected this argument stating:

The argument, now advanced, in favor of the continued existence of the right to hunt over the land mentioned in the treaty, after it had become subject to state authority, admits that the privilege would cease by the mere fact that the United States disposed of its title to any of the land, although such disposition, when made to an individual, would give him no authority over game, and yet that the privilege continued when the United States had called into being a sovereign State, a necessary incident of whose authority was the complete power to regulate the killing of game within its borders. This argument indicates at once the conflict between the right to hunt in the unoccupied lands, within the

hunting districts, and the assertion of the power to continue the exercise of the privilege in question in the State of Wyoming in defiance of its laws. (163 U.S. at 510-511)

This Court went on to observe:

The act which admitted Wyoming into the Union, as we have said, expressly declared that the State should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority. But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule. (163 U.S. at 511)

*Ward v. Racehorse* stands for the proposition that, upon admission into the Union, a state becomes endowed with powers and authorities equal in scope to those enjoyed by states already admitted and further articulates the concept that the Federal Government prior to statehood held its territories in trust for a future state. A newly admitted state becomes the successor in interest in those paramount sovereign and proprietary rights previously held by the Federal Government over its territories.

This Court concluded in *Ward v. Racehorse*:

Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public

faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the States. (163 U.S. at 516)

The *Racehorse* doctrine was followed by this Court in *Kake v. Egan*, 369 U.S. 60 (1962).

In this case the Court was confronted with the problem of interpreting section four of the Alaska Statehood Act as it pertained to claimed fishing rights possessed by Indians of Alaska. The Federal Government contended that the reservation of absolute jurisdiction in the Alaska Enabling Act over Indian "property" ousted the state of any authority to regulate fishing by Indians in Alaska.

Analysis of the disclaimer clause of the Alaska Statehood Act led the Court to consider the legal evolution of the term "absolute jurisdiction" as it pertained to property rights as distinguished from governmental rights. The Court observed that the influence of state law upon Indians has increased rather than decreased since the days of Chief Justice Marshall, e.g., *Johnson v. McIntosh*, 8 Wheat. 543, 21 U.S. 230 (1823) and *Worcester v. Georgia*, 6 Pet. 515, 31 U.S. 350 (1832). By way of comparing the quantum of state power over on-reservation Indian activities with state power over off-reservation Indian activities, this Court stated:

These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. Congress has gone even further with respect to Alaska reservations, 72 Stat. 545, 18 U.S.C. § 1162, 28 U.S.C. § 1360. State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation. It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country. See Cohen, *Indian Rights and the Federal Courts*, 24 Minn. L. Rev. 145, 153 (1940), citing *Pablo v. People*, 23 Colo. 134, 46 P. 636. Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, *Ward v. Racehorse*, 163 U.S. 504; *Tulee v. Washington*, 315 U.S. 681, in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in *Tulee* to fishing within a reservation, *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 P. 557; *Moore v. United States*, 157 F.2d 760, 765 (C. A. 9th Cir.). See *State v. Cooney*, 77 Minn. 518, 80 N.W. 696.

True, in *Tulee* the right conferred was to fish in common with others, while appellants here claim exclusive rights. But state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee*. Nor have appellants any fishing rights derived from federal laws. This Court has never

held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy. Because of the migratory habits of salmon, fish traps at Kake and Angoon are no merely local matter.

Congress has neither authorized the use of fish traps at Kake and Angoon nor empowered the Secretary of the Interior to do so. (369 U.S. at 75-76)

This Court has recently recognized the distinction between on and off reservation activities in relation to the application of state laws. In *Mescalero Apache Tribe v. Franklin Jones, et al.*, 41 L.W. 4451 (March 27, 1973), this Court held at 4452:

But tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation" *Organized Village of Kake, supra*, at 75. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. See, e.g., *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398 (1968); *Organized Village of Kake, supra*, at 75-76; *Tulee v. Washington*, 315 U.S. 681, 683; *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575 (1928); *Ward v. Race Horse*, 163 U.S. 504 (1896). That principle is as relevant to a State's tax laws as it is to state criminal laws, see *Ward v. Race Horse, supra*, at 516, and applies as much to tribal ski resorts as it does to fishing enterprises. See *Organized Village of Kake, supra*.



Footnote five of the opinion at page 4453 further illustrates this line of demarcation:

The Tribe's treaty with the United States, 10 Stat. 979 (1852), which acknowledges that the Tribe is "exclusively under the laws, jurisdiction, and government of the United States . . .," does not alter the obvious effect of the state's admission legislation. See, *e.g.*, *Organized Village of Kake*, *supra*, 369 U.S., at 67-68, and cases cited therein.

Significantly the *Puyallup Tribe v. Department of Game* decision, *supra*, was cited in support of this proposition at 44 L.W. 4454:

The Court's decision in *Organized Village of Kake*, *supra*, which involved tribes organized under the Reorganization Act, demonstrates that off-reservation activities are within the reach of state law. See also *Puyallup Tribe*, *supra*, 391 U.S. at 398. What was said in *Shaw v. Gibson-Zahniser Oil Corp.* 276 U.S. 575 (1928), is relevant here.

The notion that Indians should be entitled to special treatment under state law when engaging in off-reservation fishing activities is predicated upon a strained interpretation of the "in common with" language of the Governor Stevens' treaties.<sup>5</sup> The "in common with" language refers to another subject in Article III of the *Treaty with the Yakima*, *supra*, which reads:

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<sup>5</sup>Five treaties were executed by Territorial Governor Isaac I. Stevens with various Indian tribes resident in the State of Washington: *Treaty of Medicine Creek*, *supra*; *Treaty with the Quinault*, 12 Stat. 971; *Treaty of Point Elliott*, 12 Stat. 927; *Treaty of Point-No-Point*, 12 Stat. 933; and *Treaty with the Yakima*, *supra*.



... as also the right, in common with citizens of the United States, to travel upon all public highways.

It is submitted that this "in common with" treaty language cannot logically be interpreted to mean that Indians are entitled to special treatment with regard to the application of state or municipal traffic laws or regulations. The same result should be reached in interpreting the "in common with" language regarding the subject of fishing activities in off-reservation waters.

II. Whether the legislature of the State of Washington has the constitutional authority to classify steelhead trout as a game fish and thus preclude any commercial taking or dealing in that species by treaty Indians in off-reservation waters?

The legislature of the State of Washington has classified steelhead trout as a game fish. RCW 77.08.020\*. Respondents, however, contend that such a classification is beyond the reach of state police power activity and they seek a judicial interpretation of the treaty clause in question to authorize them to commercially exploit the steelhead resource. It is the position of the Washington Department of Game that such an assertion is not well founded.

This Court, in *Puyallup Tribe v. Department of Game*, *supra*, expressly disposed of this contention with the following language:

But the manner of fishing, the size of the take,

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\*The classification of steelhead as a game fish has been the law since 1925, Session Laws of Washington, 1925 Extraordinary Session, Chapter 178, Section 4.

the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians. (391 U.S. at 398)

Cases of similar import include *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916); *Tulee v. Washington*, 315 U.S. 681 (1942); and *Mescalero Apache*, *supra*.

The steelhead trout is highly prized by sportsmen because of its unique fighting characteristics. This was recognized by the legislature when it designated the steelhead trout the official fish of the State of Washington. RCW 1.20.045. As previously noted, the limited populations of steelhead do not lend themselves to commercial exploitations. (Re. A. 55) In light of such facts, the legislature acted on a rational basis by classifying steelhead as a game fish.

### CONCLUSION

For the foregoing reasons and authorities, the Washington Department of Game, appellant, submits that the decision of the lower court should be reversed.

Respectfully submitted:

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Washington Department of Game

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(1903)



**In the Supreme Court of the United States**

**OCTOBER TERM, 1972**

**No. 72-481**

**THE DEPARTMENT OF GAME OF THE STATE OF  
WASHINGTON, PETITIONER**

**v.**

**THE PUYALLUP TRIBE**

**No. 72-746**

**THE PUYALLUP TRIBE, PETITIONER**

**v.**

**THE DEPARTMENT OF GAME OF THE STATE OF  
WASHINGTON**

**ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF WASHINGTON**

**BRIEF FOR THE PUYALLUP TRIBE**

**OPINIONS BELOW**

This Court's previous opinion in this case is reported at 391 U.S. 392. The original opinion of the Supreme Court of the State of Washington is reported at 70 Wash. 2d 245, 422 P. 2d 754; that court's opinion after remand (Pet. App. No. 72-481) is reported at 80 Wash. 2d 561, 497 P.2d 171. The findings



and conclusions of the Superior Court for Pierce County, Washington on remand (App. 21-25) and the opinion of that court (App. 12-21) are unreported.

#### JURISDICTION

The judgment of the Supreme Court of Washington was entered on May 4, 1972. Timely petitions for rehearing were denied by that court on June 23, 1972. The petition for a writ of certiorari in No. 72-481 was filed on September 21, 1972. On September 20, 1972, Mr. Justice Douglas extended the Tribe's time for filing a petition for a writ of certiorari to November 20, 1972, and the petition in No. 72-746 was filed on that date. Both petitions were granted on March 19, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

#### QUESTION PRESENTED

Whether the State of Washington's laws and regulations absolutely prohibiting the Puyallup Indians from net fishing for steelhead trout at their usual and accustomed fishing places, rather than limiting sports fishing so as to preserve at least some measure of the Indians' net fishery, are necessary for the conservation of fish and do not discriminate against the Indians.

#### STATUTES AND TREATY PROVISIONS INVOLVED

The Treaty of Medicine Creek, 10 Stat. 1132, Article III, provides:

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, \* \* \*.

Revised Code of Washington 77.16.060 provides in relevant part:

It shall be unlawful for any person to lay, set, use, or prepare any \* \* \* net \* \* \* of any kind, in any of the waters of this state with intent thereby to catch, take, or kill any game fish. It shall be unlawful to lay, set or use a net capable of taking game fish in any waters of this state except as permitted by regulation of the department of fisheries; *Provided*; That persons may use small landing nets or under written permit issued by the director may use nets or seines in the taking of nongame fish.

Revised Code of Washington 77.08.020, provides in relevant part:

As used in this title or in any rule or regulation of the [game] commission, "game fish" include \* \* \* *Salmo gairdnerii* commonly known as steelhead \* \* \*.

#### STATEMENT

The Puyallup Tribe is a federally recognized Indian Tribe with a Constitution and by-laws approved by the United States under the Indian Reorganization Act of 1934, 48 Stat. 984. It is one of the tribes which was a party to the Treaty of Medicine Creek signed on December 26, 1854, and ratified by the Senate on March 3, 1855, 10 Stat. 1132-1137. See *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 394-395. The treaty, in return for the Tribe's relinquishment of large areas of land (Article I), reserved an area of land for the Tribe's exclusive use (Article II), and also reserved to the Tribe the right "of taking fish, at all usual and accustomed grounds and stations \* \* \*

in common with all citizens of the Territory" (Article III). For many years the Tribe conducted an active net fishery, for subsistence and commercial purposes, in and near the Puyallup River. See *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 396, See also App. 130-132.

In 1963, the Departments of Game and Fisheries of the State of Washington initiated this action against the Puyallup Tribe and some of its members, to determine if the Tribe and its members are subject to the State's laws prohibiting net fishing at their usual and accustomed places or whether they are exempted from those laws by rights granted them in the Treaty of Medicine Creek. The suit also sought to enjoin them from violating state fishing regulations. The trial court held that the Puyallup Indians have no treaty rights under the Treaty of Medicine Creek, and entered a permanent injunction restraining the Puyallup Indians from fishing in any manner contrary to the laws of the State of Washington (Pet. App. No. 72-481, pp. 563-564).

The Supreme Court of the State of Washington reversed. *Department of Game v. Puyallup Tribe*, 70 Wash. 2d 245, 422 P. 2d 754. That court confirmed the Tribe's treaty-protected fishing rights and remanded the case to the trial court with directions that the decree should reflect that "(1) If a defendant proves that he is a member of the Puyallup Tribe; and (2) He is fishing at one of the usual and accustomed fishing places of that tribe; (3) He cannot be restrained or enjoined from doing so, unless he is violating a statute, or regulation of the [State] Departments

[of Fisheries and of Game] promulgated thereunder, which has been established to be reasonable and necessary for the conservation of the fishery." 70 Wash. 2d at 262, 422 P. 2d at 764 (emphasis added).

On review, this Court affirmed *Puyallup Tribe v. Department of Game*, 391 U.S. 392. It held that the Tribe and its individual members hold reserved fishing rights under the Treaty of Medicine Creek that are independent of their reservation of land.<sup>1</sup> In measuring those rights in light of the words "in common with" the Court rejected the argument that the Tribe had no right beyond that of other citizens and quoted from *United States v. Winans*, 198 U.S. 371, 380, that "[t]o construe the treaty as giving the Indians 'no rights but such as they would have without the treaty' \* \* \* would be 'an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.'" 391 U.S. at 397.

The Court held that Indian off-reservation fishing rights are subject to state conservation laws only if those laws give adequate recognition to the treaty rights, are "'necessary for the conservation of fish'" (*id.* at 399, 401-402, n. 14) and do "not discriminate against the Indians" (*id.* at 398). The Court remanded the case for a determination of "[w]hether the prohibition of the use of set nets in those fresh waters was a 'reasonable and necessary' \* \* \* conservation meas-

<sup>1</sup> See 391 U.S. at 394, n. 1. The question of the present existence of the reservation of land is pending in the Court of Appeals for the Ninth Circuit. *United States v. State of Washington*. No. 73-1793.

ure" (*id.* at 401), admonishing that "any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with'" (*id.* at 403).

Different positions have been taken on remand by two Departments of the State of Washington—The Department of Fisheries with respect to salmon, and the Department of Game with respect to steelhead trout. Prior to the trial on remand and after public hearings and consultation with tribal leaders (App. 112), the Department of Fisheries changed its regulations to permit regulated Indian net fishing for salmon in the Puyallup River, though it maintained its prohibition of such fishing in Commencement Bay, where the fish mill before going upstream, and in the upper portions of the river where the fish spawn (App. 16, 22-23, 104-106; P. Exhibit 6).<sup>2</sup> The Department of Fisheries also curtailed certain commercial fishing near the Puyallup River to increase the runs available in the river (App. 113; P. Exhibit 5).

The Department of Game (which regulates steelhead trout fishing), in contrast to the Department of Fisheries, maintained the position that it had taken before this Court's decision, namely, that so long as Indians and non-Indians are treated alike it has no duty to recognize any special Indian fishing rights. The Department of Game continued its total prohibition of net fishing for steelhead trout (App. 16, Tr.

<sup>2</sup> This Exhibit, which is the text of the regulation, is lodged with the Clerk.



25,\* see also the Brief of the Department of Game in this Court, pp. 16-17).

After a trial on remand consisting primarily of the testimony of three biologists (App. 31-175), the Superior Court entered findings of fact and conclusions of law (App. 21-26) as well as a written opinion (App. 12-21). The court found that the regulations imposed by the Department of Fisheries were necessary for the conservation of fish and were "not unreasonable as far as the Indians are concerned" (App. 23). But the court held that the Department of Game's "regulations are not shown to be reasonable and necessary" for the conservation of fish (App. 24), particularly in light of the court's finding that while Indian net fishing is totally prohibited, sports fishermen are allowed an annual take of 12,000 to 18,000 steelhead trout per year (App. 23-24). The court also held that there was no showing by either Department justifying an injunction against the Indians (App. 24-25).

Both sides appealed to the Supreme Court of the State of Washington. That court essentially affirmed the decision of the trial court insofar as it held the regulations of the Department of Fisheries valid. It reversed the trial court's decision as to the Department of Game, however, and upheld the Department's regulations totally prohibiting fishing by net for steelhead trout for the year 1970. It ruled that new fishing regulations for the Puyallup Tribe must be made each year, supported by "facts and data that show the reg-

\*"Tr." refers to the transcript of the trial on remand, which is lodged with the Clerk.

ulation is necessary for the conservation" of the species of fish in question (Pet. App. No. 72-481, p. 576). The court further ordered that the injunction against the Tribe should be reinstated subject to modifications consistent with the opinion of the court (*id.* at 577). In upholding the 1970 prohibition of net fishing for steelhead trout, the court held that "the catch of the steelhead sports fishery alone in the Puyallup River leaves no more than a sufficient number of steelhead for escapement necessary for the conservation of the steelhead fishery in that river" (*id.* at 573).

Both the Department of Game of the State of Washington and the Puyallup Tribe petitioned this Court for review of the judgment of the Supreme Court of Washington insofar as it concerned the validity of the laws and regulations of the State of Washington prohibiting net fishing for steelhead trout. None of the parties sought further review of the decision concerning the regulations of the Department of Fisheries (concerning salmon fishing).<sup>4</sup> On March 19, 1973, the Court granted the petitions for certiorari and consolidated the cases.<sup>5</sup>

<sup>4</sup> The Tribe continues to take exception to the extent of fishing permitted it by the Department of Fisheries but has sought review only of the Department of Game's total failure to recognize its fishing rights. It is the Tribe's view that the willingness of the Department of Fisheries to recognize Indian treaty rights will make possible a resolution of practical differences with that Department. Litigation to quantify the fishing rights of a number of Tribes including the Puyallup has been brought by the United States. *United States v. Washington*, Civil Action No. 9213, U.S.D.C., W.D. Wash.

<sup>5</sup> A conditional cross-petition by a tribal member, Ramona C. Bennett, No. 72-5437, remains pending.



## SUMMARY OF ARGUMENT

1. The question left by this Court to be decided on remand after its prior decision in this case was whether the State of Washington's total prohibition of Indian net fishing in the Puyallup River was necessary for the conservation of fish and, as applied to their treaty protected rights, did not discriminate against the Indians. In the trial on remand the evidence showed that after this Court's decision the Department of Fisheries of the State of Washington changed its position and permitted a regulated net fishery for salmon in the Puyallup River. The trial showed, however, that the Department of Game, by contrast, had continued to prohibit Indian net fishing for steelhead trout and that this prohibition was based on the State's allocation of the entire take of steelhead trout to sports fishermen rather than upon any requirement for conservation of fish. The evidence also showed that as many as 18,000 steelhead trout are taken annually in the Puyallup River by sports fishermen while all Indian net fishing for steelhead trout remains prohibited. The trial court thus correctly found that the State of Washington had failed to show that its prohibition of Indian net fishing for steelhead trout was necessary for the conservation of fish and did not discriminate against the Indians.

2. In reversing the decision of the trial court as to steelhead trout, the Supreme Court of the State of Washington applied an incorrect legal standard that is not in accord with this Court's prior decision in this case. The Supreme Court of Washington held that an Indian net fishery for steelhead trout could not be

permitted because the catch of the "sports fishery alone in the Puyallup River leaves no more than a sufficient number of steelhead trout for escapement necessary for the conservation of the steelhead fishery in that river" (Pet. App. No. 72-481, p. 573). This holding subordinates the Tribe's rights to those of sports fishermen, permitting an Indian net fishery only if there are sufficient excess fish after sports fishermen have been satisfied. This total subordination of the Indians' treaty rights is contrary to this Court's prior decision in this case and the precedents on which it was based, which recognize that the treaty provision involved here, and provisions similar to it, confer on the Indians a special right to continue to fish for trade and sustenance in accordance with their traditional way of life and present needs.

The Department of Game continues to argue as it did when this case was previously before this Court that the treaty gives members of the Tribe no fishing rights not held by all other citizens of the State. This argument was fully considered and properly rejected by this Court in its previous decision in this case, and is also foreclosed by the previous judgment of the State Supreme Court in this case which this Court affirmed.

3. If this Court agrees with our contention that the State of Washington has failed to show that its absolute prohibition of net fishing for steelhead trout is necessary for the conservation of fish and does not discriminate against the Indians, then, in light of the long history of this litigation, it should order that the Indians be afforded their treaty rights forthwith and

that future regulations of Indian net fishing for steel-head trout fully recognize and safeguard those rights.

## ARGUMENT

### I

THE TRIAL COURT CORRECTLY FOUND THAT THE STATE OF WASHINGTON FAILED TO SHOW THAT ITS TOTAL PROHIBITION OF INDIAN NET FISHING FOR STEELHEAD TROUT WAS NECESSARY FOR THE CONSERVATION OF FISH AND DID NOT DISCRIMINATE AGAINST THE INDIANS

The question left by this Court to be decided on remand was whether the State's total prohibition of net fishing in the Puyallup River was necessary for the conservation of fish and, as applied to their treaty-protected rights, did not discriminate against the Indians. Unless the State could show this, this Court decided, its prohibition of net fishing by Puyallup Indians was invalid, as contrary to their treaty rights. In order to decide these issues, a new trial was held on remand. It consisted principally of testimony by three witnesses, all biologists and experts in fisheries of the northwest coast. Two of the experts, Mr. Millenbach and Mr. Lasater, were employes of the State of Washington (App. 32, 74). The third, Mr. Heckman, was an employee of the Federal Bureau of Sports Fisheries and Wildlife (App. 143).

1. Mr. Lasater, of the State Department of Fisheries, testified that the Department of Fisheries, which regulates salmon fishing, had changed its views since this Court's previous decision in this case, and no longer opposed a regulated gill-net Indian fishery in the Puyallup River. He explained: "When the decision was made, and we read it, then it, in part, said that we

were wrong, and that there was a special Indian treaty right, and to us, gave us an obligation to recognize their right, and we also have our increased ability, fishery science has advanced \* \* \*. We are more confident of our ability to handle the fish runs in an area like this, a special Indian Fishery, than we were at the time" (App. 102). Accordingly, he testified, the Department had adopted regulations permitting a limited Indian net fishery for salmon in the Puyallup River (see P. Exhibit 6; App. 111-114). He stated that the regulations prohibit fishing in Commencement Bay where the fish mill and in their spawning grounds, but that the Department has determined that in between those two areas a net fishery can properly be allowed (App. 104-105, 111-115, 125).

Mr. Lasater also described a series of studies and of meetings with the public and with leaders of the Tribe in which regulations as to a fishing season, numbers of days of the week in which fishing would be allowed, and net types were developed (App. 111-114). He testified that a portion of the regulation limiting the length of nets to one-third of the river's width was taken from the Puyallup's own regulations.\* He described successful Indian self-regulation of salmon fishing on other reservations in the State which had resulted in increased hatchery runs, permitting increased Indian net fisheries (App. 103).

In sum, therefore, Mr. Lasater's testimony showed that while prohibiting all net fishing in the Puyallup River might be an easy way of conserving fish, it is

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\* Tr. 217. We have lodged a copy of the Tribe's present regulations with the Clerk.

by no means the only way or a necessary way, and thus that protection of the treaty rights of the Indians—including the right to a regulated net fishery—and proper conservation of fish are not mutually exclusive.

2. The testimony of Mr. Millenbach of the State's Department of Game reflected the difference between the legal position urged by his Department and that of the Department of Fisheries. His testimony was concerned less with conservation requirements than with the economic considerations underlying the State's policy of reserving steelhead trout for sports fishing. He emphasized that the number of steelhead available to sportsmen had been greatly increased by stocking the Puyallup River with fish produced at fish hatcheries financed by hunting and fishing license fees (App. 33), but he admitted that the hatcheries are also supported by the federal government (App. 35) and apparently by reparations paid by power companies (App. 37). Mr. Millenbach testified that in recent years sportsmen had been catching an average of more than 12,000 steelhead annually in the Puyallup River (App. 37).<sup>1</sup> By including the value of transportation, food and drink consumed, sporting equipment sold and the like, he estimated that the economic value of a fish taken for sport is \$60, which he claimed to be far greater than that of a fish taken for subsistence or commerce (App. 37, 53-54).

Mr. Millenbach's testimony indicated that the De-

<sup>1</sup> He testified on cross-examination that in one recent year the known sports catch on the Puyallup River was 18,000 steelhead trout (App. 52).



partment of Game, in contrast to the Department of Fisheries, had not considered any compromise position that would allow Indian net fishing with limitations as to location, seasons, days of the week, sizes of nets, total take or the like. Although he testified in general terms that it would be "contrary to conservation" to allow net fishing for steelhead in the Puyallup River (App. 43), his testimony on cross-examination made clear that the State's prohibition of net fishing is the result of its allocation of the entire take of steelhead trout to sports fishing and would not otherwise be required to preserve the fishery (App. 62-63):

Q. Let me ask you this: you said a net fishery would be absolutely impossible in terms of your definition of conservation. What if we cut down the number of fish a sportsman is allowed to catch, or the number of days, whatever, and we allowed a highly regulated, self-regulating Indian net fishery. Would that be possible to still reach the same number of fish being caught now?

A. It would be possible, yes.

Q. Why don't you do that?

A. We do not have the authority to do it.

Q. What do you mean, you don't have the authority to do it? You make the regulations.

A. By the laws of the State of Washington, steelhead may not be taken with a net.

Q. If you could, would you do it?

Mr. CONIFF: I object, Your Honor. I think the witness has answered the question.

The COURT: I think he has made himself clear.

**Mr. SENNHAUSER:** One moment, Your Honor.

**Q.** Mr. Millenbach, does it make any difference to conservation, whether 2,000 or 3,000, whatever, fish are caught by sportsmen or whether they are caught by Indians?

**A.** Conservation alone, no.

**Q.** It makes no difference?

**A.** It would be possible to rebalance the numbers caught and still maintain conservation. There is a surplus of fish or harvestable part that can be cropped in a system of conservation.

**Mr. SENNHAUSER:** No further questions.

This testimony, by the Department of Game's own witness, we submit, not only fails to establish that the State's prohibition of the taking of steelhead by net in the Puyallup River is necessary for the conservation of fish, but affirmatively shows that this total prohibition is not necessary for that purpose.

3. Any remaining doubt as to whether an absolute prohibition of net fishing for steelhead in the Puyallup River is necessary for the conservation of fish was dispelled, we submit, by the testimony of the remaining witness, Mr. Heckman, a federal biologist. He testified specifically that a properly regulated net-fishery for steelhead trout on the Puyallup River would be "commensurate with" conservation (App. 152). He based this view partly on his experience with the successful Quinault fishery for steelhead trout in the Quinault and Queets Rivers in Washington where the Indians carry on a commercial gill-net fishery for steelhead and a successful sports fishery within the



reservation (App. 148, 152, 167, 174-175). He was also familiar with the gill-net fishery for steelhead in the Columbia River (App. 152). He was asked specifically whether a net fishery on the Puyallup River "would adversely affect the spawning escapement for steelhead" on that river and responded that "if properly regulated \* \* \* an optimum spawning escapement" could be achieved (App. 152).\*

In sum, the State of Washington has totally prohibited the Indian net fishery for steelhead trout on the Puyallup River while permitting sports catches averaging more (perhaps substantially more) than 12,000 fish annually, and the State has failed to show that this prohibition does not discriminate against the Tribe's treaty rights or that it is a "'reasonable and necessary'" conservation measure, *Puyallup Tribe v. Department of Game*, *supra*, 391 U.S. at 401-403. Accordingly, the trial court on remand was correct, in our view, in holding (App. 20):

\* \* \* In view of the large number of steelhead caught in the Puyallup River, it would seem that the Game Department is not in a position to say that the Indians can be entirely excluded from the exercise of any special rights. It is within the province of the Department to adopt a regulation setting forth such details as the time in which steelhead may be taken and by what means. It should compute how much escapement should be allowed so that a comprehensive regulation may be formulated protect-

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\* An optimum escapement requires a certain number of fish to be harvested so that fish do not die from overpopulation of the river. See App. 114 (testimony of Mr. Lasater).

ing the special rights of the Indians while still adequately conserving this natural resource.

## II

THE HOLDING OF THE SUPREME COURT OF WASHINGTON, THAT INDIAN NET FISHING CAN BE ALLOWED ONLY IF THERE IS A SURPLUS AFTER SPORTS FISHING AND NECESSARY ESCAPEMENT, RELEGATES INDIAN FISHING TO A SUBORDINATE ROLE IN VIOLATION OF THE INDIANS' TREATY RIGHTS AS INTERPRETED IN THIS COURT'S PRIOR OPINION IN THIS CASE.

This Court held, in *Puyallup Tribe v. Department of Game, supra*, 391 U.S. at 398:

The [treaty] right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. Act of June 2, 1924, 43 Stat. 253, as superseded by § 201(b) of the Nationality Act of 1940, 8 U.S.C. § 1401(a)(2). But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

In upholding, as applied to the Puyallup Tribe in 1970, the State's classification of the steelhead as a game fish, R.C.W. 77.08.020 (p. 3, *supra*), and its absolute prohibition of taking game fish by nets, R.C.W. 77.16.060 (p. 3, *supra*), the court below reasoned (Pet. App. 72-481, p. 573):

[T]he catch of the steelhead sports fishery alone in the Puyallup River leaves no more

than a sufficient number of steelhead for escapement necessary for the conservation of the steelhead fishery in that river.

On its face, therefore, the decision discriminates against the Tribe's treaty rights. It subordinates the Tribe's rights to those of sports fishermen and gives the Tribe only what might be left after sports fishermen of unlimited number have had their take. Moreover, the opinion below does not discuss the trial court's finding that the Department of Game had not shown the prohibition to be necessary for the conservation of fish, and it ignores the substantial evidence supporting that finding (see point I, *supra*). While it directs the Department of Game to review annually the possibility of a netting season for the Tribe, the opinion below clearly permits the State to reserve steelhead trout exclusively for sports fishing. As a practical matter, therefore, in light of the State's past deference to game fishermen, the opinion offers little prospect that any substantial Indian net fishing would ever be allowed. Indeed, in the one "hearing" that has been held on the subject by the State Game Commission since the judgment below, the large sports take was permitted to continue without abatement and the Indian fishery was again totally prohibited.\*

The treaty, however, does not state that the Indian fishing rights it guarantees are to be subordinate to the fishing rights of others; nor was the treaty intended to provide the Indians merely with a right to

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\* Information supplied by the Department of the Interior and documented in depositions filed in *United States v. Washington*, Civil Action No. 9213, U.S.D.C., W.D. Wash. See note 4, *supra*.

recreational fishing. As this Court recognized with respect to the fishing rights treaty of another Northwest coastal tribe in *Tulee v. Washington*, 315 U.S. 681, 684 (a decision strongly relied upon by the Court in its *Puyallup* opinion):

\* \* \* [W]e are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their Tribes.

Fishing was and, to the extent permitted, has remained the way of life of the Northwest coastal tribes.<sup>10</sup> Indeed, it was the vital importance of fishing to their way of life which led to the inclusion of language in the treaties with virtually all of the Northwest Coastal tribes, such as the Puyallup, reserving a right to fish at the Indians' usual and accustomed places.<sup>11</sup> As this Court explained in *United States v. Winans*, 198 U.S. 371, 381 (also relied upon in *Puyallup*), in construing treaty language essentially similar to that involved here:

<sup>10</sup> The historical dependence of Northwest Indians upon fishing for their subsistence and livelihood as well as its continuing economic and cultural importance are recounted in *Sohappy v. Smith* (*United States v. Oregon*), 302 F. Supp. 899, 907 (D. Ore.).

<sup>11</sup> Some ten treaties with the tribes of the Northwest were negotiated on behalf of the United States and executed in 1854 and 1855 by Governor Isaac Stevens. Each of the treaties included a phrase respecting fishing virtually identical to that found in Article III of the Medicine Creek Treaty (see *supra*, p. 2). 2 Kappler, *Indian Affairs—Laws and Treaties*, pp. 495-497, 501-506, 510-512, 521-531, 536-545 (1903). See generally Friends' Service Committee, *Uncommon Controversy, Fishing Rights of the Muckleshoot, Puyallup, and Nisqually Indians*, pp. 18-40 (1970).

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. \* \* \* [T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of these not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals. \* \* \* They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved “in common with citizens of the Territory.” \* \* \*

*Winans* thus recognized that the Indians made reservations in the treaties not only of tracts of land upon which to live, but also of rights to fish both within and outside those lands.<sup>12</sup> It is, of course, axiomatic that such reserved rights should be interpreted so as to fulfill the purposes for which they were reserved.<sup>13</sup> The reserved fishing right of the Puyallup

<sup>12</sup> “It is clear that the reservation [land] was intended only as a residence, and the Indians were to remain free to roam and fish at their usual places.” *Skokomish Indian Tribe v. France*, 320 F. 2d 205, 210 (C.A. 9).

<sup>13</sup> The interpretation of reserved rights has had its fullest development in cases involving water rights. See, e.g., *Winters v. United States*, 207 U.S. 564; *Arizona v. California*, 373 U.S. 546, 595–601. Justice McKenna, who wrote the Court’s opinion in *Winters*, had written the Court’s opinion in *Winans* three

Indians, therefore, should be interpreted to permit the members of the Tribe to meet their continuing needs for subsistence and trade, fully recognizing that the right is not exclusive (*Puyallup, supra*, 391 U.S. at 398), and that it is necessarily limited by the depletable nature of the resources and thus may be regulated to prevent their destruction (391 U.S. at 399, 401-403). But to diminish the treaty right to one of mere sports fishing in common with other citizens would give "the Indians 'no right but such as they would have without the treaty'" (391 U.S. at 397) and thus would effectively abrogate the treaty right. Such a result is foreclosed by this Court's prior *Puyallup* decision (391 U.S. at 397-398) and, as we have shown in point I, *supra* (and as the trial court found) it is in any event not necessary for the conservation of fish.

Moreover, Congress has recently reaffirmed the continuing vitality of treaty provisions guaranteeing Indian fishing rights. Public Law 280, both as originally enacted and as amended,<sup>14</sup> explicitly excepts from the extensions of state civil and criminal jurisdiction authorized thereunder all rights "afforded under Fed-

years earlier, and relied on that decision in *Winters*. 207 U.S. at 577. The rationale of the two cases is the same. *Arizona v. California* recognized the reserved right of Indians along the Colorado River to satisfy their present and future needs for irrigation from that river's already heavily appropriated flow because only such a measure of water rights would fulfill the purposes for which the United States reserved the water for the Indians. 373 U.S. at 600-601.

<sup>14</sup> Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. 1162, 28 U.S.C. 1360; Act of April 11, 1968, Title IV, 82 Stat. 78, 25 U.S.C. 1321.



eral treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." And, after extensive hearings in 1964, the Senate let die in committee two proposals to terminate Indian fishing rights on the West Coast. Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, on S.J. Res. 170 and S.J. Res. 171, 88th Cong., 2d Sess. These hearings documented the continuing need of the Tribes to exercise their fishing rights for their sustenance and livelihood and refuted claims that the abolition of Indian fishing rights was required for the conservation of fisheries. If, indeed, Indian treaty rights are in effect to be abolished, Congress, rather than States, must act, and should give full consideration to compensating the Tribes for any rights taken away.

In its brief in this Court the Department of Game of the State of Washington argues that any special treaty right the Indians may have had was abolished by the admission of the State into the Union on an equal footing with other states, and that the treaty phrase "in common with all citizens of the Territory" means the Indians are bound by state fishing regulations whether or not those regulations are shown to be necessary for the conservation of fish (Br. 8-17). The Department relies primarily on this Court's decisions in *Ward v. Race Horse*, 163 U.S. 504, and *Kake v. Egan*, 369 U.S. 60.

These are the same authorities and the same arguments that the Department of Game relied on when the case was last here (Resp. Br. in No. 247, October,



Term, 1967, pp. 22-36). After full consideration, those arguments were rejected in this Court's previous opinion in this case, 391 U.S. at 397-400.<sup>15</sup> And, as the court below held (Pet. App. No. 72-481, p. 571), these contentions of the Department are also foreclosed by the State Supreme Court's previous judgment in this case, which this Court affirmed.<sup>16</sup>

In sum, the question presented on the remand from this Court in *Puyallup* was not whether the Indians have a special fishing right or whether that right exempts them from state regulation except as shown to be necessary for the conservation of fish. Those principles had previously been established by this Court's

<sup>15</sup> See also *id.* at 401, n. 14, final two paragraphs. The only decision which ever embraced the "equal footing" doctrine as a limitation on the exercise of Indian treaty rights after statehood was *Ward v. Race Horse*, 163 U.S. 504. At the time it was rendered, *Race Horse* was out of harmony with a prior Supreme Court ruling on the effect of statehood acts on preexisting Indian rights. *Blue Jacket v. Board of Commissioners of Johnson County (The Kansas Indians)*, 5 Wall. 737, 755-756. Any doubts about the inapplicability of the doctrine to Indian treaties were laid to rest with the tacit overruling of the "equal footing" holding of *Race Horse* less than a decade later in *United States v. Winans*, *supra*, 198 U.S. at 382-384. See also *McClanahan v. Arizona State Tax Commission*, No. 71-834, decided March 27, 1973. And see the Memorandum for the United States as *Amicus Curiae* in Nos. 246, 247, and 319, October Term, 1967, in which the same arguments now made by the Department of Game were answered.

<sup>16</sup> Nothing in *Mescalero Apache Tribe v. Jones*, No. 71-738, decided March 27, 1973, suggests that a treaty provision expressly providing an off-reservation right can be ignored or abrogated by a State. Nor is there any conflict between that decision and the Court's previous decision in this case. The treaty is the "express federal law to the contrary" referred to in the passage from *Mescalero* (slip op., p. 4) quoted by the Department of Game (Br. 15).

decisions and were reaffirmed in *Puyallup*. The question on remand was whether the State's regulations of that right were reasonable and necessary for the conservation of fish and did not discriminate against the Indians. As we have shown, the State's prohibition of all Indian net fishing for steelhead trout in the Puyallup River is not necessary for the conservation of fish and gives no recognition to the special Indian fishing right guaranteed by the treaty, and thus, under this Court's prior decision, was correctly found by the trial court to be an invalid diminution by the State of a federal treaty right. Cf. *Kolovrat v. Oregon*, 366 U.S. 187; *Hauenstein v. Lynham*, 100 U.S. 483.

### III

IN LIGHT OF THE HISTORY OF THIS LITIGATION, AN APPROPRIATE REMEDY SHOULD ASSURE THAT THE INDIANS ARE AFFORDED THEIR FISHING RIGHTS FORTHWITH

If the Court agrees with our contention that the State has failed to show that its total prohibition of Indian net fishing for steelhead trout in the Puyallup River is necessary for the conservation of fish and does not discriminate against the Indians, then the question of fashioning an adequate remedy arises. This case has been in litigation since 1963. During most of that time the Tribe has been deprived of all of its treaty fishing rights, and it still remains deprived of those rights with respect to steelhead trout. State administrative determinations and judicial decisions have failed during this period to provide adequate protection for the rights secured to the Puyallup Tribe under the Treaty of Medicine Creek.

This Court, of course, cannot itself fashion fishing regulations for the Puyallup River. But it can and should hold that, as applied to treaty-protected Indians, the State's total prohibition of net fishing for steelhead trout violates the Treaty of Medicine Creek, and that such fishing must be permitted forthwith. This Court should also hold that in adopting new regulations the Department of Game must act in a manner that is both procedurally and substantively fair to the Tribe. Substantively, it must sufficiently curtail sports fishing to assure the Tribe an adequate subsistence and commercial fishery. Procedurally, the State should be required to provide an opportunity for the Tribe's views to be heard before it adopts regulations affecting the Tribe. As a guide, we suggest the criteria that have been accepted by both the State of Oregon and the various tribes there in handling the same problem in that State. As stated in *Schappy v. Smith* (*United States v. Oregon*), 302 F. Supp. 899, 912 (D. Ore.):

The State must recognize that the federal right which the Indians have is distinct from the fishing rights of others over which the state has a broader latitude of regulatory control and that the tribal entities are interested parties to any regulation affecting the treaty fishing right. They, as well as their members to whom the regulations will be directly applicable, are entitled to be heard on the subject and, consistent with the need for dealing with emergency or changing situations on short notice, to be given appropriate notice and opportunity to participate meaningfully in the rule-making process.

In the interim, until valid regulations are adopted by the State after appropriate proceedings, the Puyallup Tribe should be allowed to enforce its own regulations of steelhead fishing by members of the Tribe and to adopt and enforce further regulations designed to assure a sufficient escapement for spawning.<sup>17</sup> As the record in this case shows, Indian tribes have without state supervision successfully regulated fishing by their members within reservations although that regulation necessarily affects fishing elsewhere in the stream system (see pp. 12, 15-16, *supra*). Tribes have also regulated off-reservation fishing by their members. See *Settler v. Yakima Tribal Court*, 419 F. 2d 486 (C.A. 9), certiorari denied, 398 U.S. 903, decision on remand, Civil No. 2378, E.D. Wash., May 5, 1971; *Off-Reservation Fishing Rights of Indians in Washington and Oregon*, 69 I.D. 68. Here, the Tribe's interest in maintaining the fishery on the Puyallup River is as great as that of the State, and should be relied upon unless and until the State adopts a regulatory program for

<sup>17</sup> Such Tribal regulations are, of course, valid and enforceable against tribal members regardless of the co-existence of valid state regulation of the same activities. See authorities cited *infra*. Department of the Interior regulations also authorize assistance by the United States, where needed, in regulating off-reservation fishing. See 25 C.F.R. Part 256. These Department of the Interior regulations were not intended to pre-empt state law and thus, in our view, an Indian fishing off-reservation in violation of valid tribal regulations would have no federal defense to enforcement against him by the State of its fishing laws. See *State v. Gowdy*, 1 Ore. App. 424, 462 P.2d 461.

<sup>18</sup> We have lodged a copy of the opinion with the Clerk.

steelhead trout fishing that gives adequate recognition to the Tribe's treaty rights.

#### CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Washington should be reversed on the Tribe's petition and affirmed on the questions raised by the petition of the Department of Game.

Respectfully submitted.

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JUNE 1973.



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IN THE  
Supreme Court of the United States, U.S.

Supreme Court, U.S.

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OCT 9 1973

WILLIAM R. CLARK

COMMISSIONER, TRIBES

NO. 12-720

THE FEDERAL TRIBE

PEOPLE

THE DEPARTMENT OF GAME OF  
THE STATE OF WASHINGTON,

Respondent

On Certiorari from the Supreme Court of Washington

BRIEF OF AMICI CURIAE

NATIONAL CONFERENCE OF AMERICAN INDIANS, INC.  
ARAPAHOE TRIBE OF WYOMING  
CONFEDERATED SALISH & KOOTENAI  
TRIBES OF MONTANA  
HOOPA VALLEY TRIBE OF CALIFORNIA  
QUINVAULT TRIBE OF WASHINGTON  
THREE AFFILIATED TRIBES OF  
FORT BERTHOLD RESERVATION,  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1971

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No. 72-746

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THE PUYALLUP TRIBE,  
*Petitioner,*

v.

THE DEPARTMENT OF GAME OF  
THE STATE OF WASHINGTON,  
*Respondent.*

---

On Certiorari from the Supreme Court of Washington

---

BRIEF OF AMICI CURIAE,  
NATIONAL CONGRESS OF AMERICAN INDIANS, INC.  
ARAPAHOE TRIBE OF WYOMING,  
CONFEDERATED SALISH & KOOTENAI  
TRIBES OF MONTANA,  
HOOPA VALLEY TRIBE OF CALIFORNIA  
QUINAUTL TRIBE OF WASHINGTON  
THREE AFFILIATED TRIBES OF  
FORT BERTHOLD RESERVATION,  
NORTH DAKOTA

---

**I. Statement of Interest**

Amicus curiae, the National Congress of American Indians, Inc. (NCAI), is a nonprofit association of some 147 Indian tribes, including virtually all of the major organized tribes in this country. Its purpose is to promote the interests of American Indians. It was incor-

porated in Oklahoma in 1954, and its national headquarters is at 1346 Connecticut Avenue, N.W., Washington, D.C.

The amici tribes named above are all organized, self-governing tribes, recognized as such by the Secretary of the Interior.

Your amici support the position of the Government representing the Puyallup Tribe in this case, and urge this Court to make explicit its implied holding in the first Puyallup case, 391 U.S. 392 (1968), that the Indians are entitled to a fair share of the fishery.

## II. The Evolution of Fishing Rights Cases Before and After This Court Decided *Puyallup I* in 1968

Prior to this Court's decision in *Puyallup I*<sup>1</sup> there were three lines of cases construing Indian fishing rights. One position (the Idaho rule<sup>2</sup>) held that the state had no power at all to regulate the Indians' off-reservation treaty rights. This left the field to tribal and federal jurisdiction, and was the position most preferred by the Indians.

The second line of cases (the Ninth Circuit rule)<sup>3</sup> was based on this Court's *Tulee* decision in 1942,<sup>4</sup> which had said that the states could impose on the Indians' off-reservation fishing such restrictions concerning the time and manner of fishing "as are necessary for the conservation of fish." The Ninth Circuit held (1) that

<sup>1</sup> *Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968).

<sup>2</sup> *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), cert. den. 347 U.S. 937.

<sup>3</sup> *Maison v. Confederated Tribes*, 314 F.2d 169 (9th Cir. 1963), cert. den. 375 U.S. 829; see also *Holcomb v. Confederated Tribes*, 382 F.2d 1013 (9th Cir. 1967); *Makah Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951).

<sup>4</sup> *Tulee v. Washington*, 315 U.S. 681 (1942).

the state had the burden of showing the "necessity" of its regulations as applied to Indians with treaty rights, and (2) that "necessary" meant "indispensable," and that meant that the state had to try to achieve conservation first by restricting non-Indians, who have no treaty rights, and only if that would not be sufficient could the state restrict the Indians who were exercising treaty rights.

The third line of cases (the Washington rule) held, as did the Ninth Circuit rule, that the state had the burden of showing that its regulations were "necessary". However, the Washington court rejected the Ninth Circuit's interpretation that "necessary" meant "indispensable".<sup>5</sup>

It might seem that the only difference between the Ninth Circuit rule and the Washington rule was whether "necessary" meant "indispensable". But that would overlook the real difference, which was one of attitude or approach. Whereas the Ninth Circuit followed the traditional rule of construction that Indian treaty rights are not to be construed narrowly,<sup>6</sup> the Washington court on

<sup>5</sup> *Department of Game v. Puyallup Tribe*, 70 Wash. 2d 241, 422 P.2d 754 (1967) (Puyallup I).

<sup>6</sup> *United States v. Winans*, 198 U.S. 371, 380 (1905) ("we will construe a treaty with the Indians as 'that unlettered people' understood it"). See also *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Seufert Brothers Co. v. United States*, 249 U.S. 194, 198 (1919); *Tulee v. Washington*, 315 U.S. 681, 684 (1942); *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 397-8 (1968); *Menominee Tribe v. United States*, 391 U.S. 404, 406 n.2, 412-13 (1968). The above are all fishing or hunting rights cases which but follow the general rule in all cases, see, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832) ("the language used in treaties with the Indians should never be construed to their prejudice"); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) ("any doubtful expressions in [the treaty] should be resolved in the Indians' favor").



the other hand has always followed a narrow, grudging approach, of which the following is typical:<sup>7</sup>

"... we are persuaded . . . that the time is long past when there should be a supercitizenship on the part of those proudly claiming Puyallup-tribe ancestry which entitles them to disobey laws and regulations imposed for the conservation of a great natural resource, which all other citizens must obey. However, it is a supercitizenship conferred by treaty, and only the United States can remove the discrimination."

When this Court affirmed Puyallup I, it seems clear that it was affirming the Washington court's actual ruling that the Indians had special treaty rights not enjoyed by other citizens, and that the state had the burden of showing that regulation of those rights was necessary for conservation. It also seems that this Court was disapproving the Ninth Circuit's "indispensable" interpretation of "necessary,"<sup>8</sup> and a fortiori the Idaho rule that the state cannot regulate at all.

But we submit that this Court was *not* endorsing the Washington court's restrictive, grudging approach to Indian treaty rights. If it was, then these important rights can be rendered meaningless, as they were by the court below, and this Court's previously settled rule of construction (see note 6 above) has been ignored. We submit that the correct rule of construction remains the one expressed in *Winans*,<sup>9</sup> that the rights are to be construed in such a way as to give effect to what the In-

<sup>7</sup> Puyallup I above 422 P.2d at 759. For other examples of Washington's narrow approach, see cases analyzed in Hobbs, *Indian Hunting and Fishing Rights II*, 37 Geo. Wash. L. Rev. 1251, 1253-1258 (1969); and see *State v. Moses*, 79 Wash. 2d 104, 483 P.2d 832 (1971).

<sup>8</sup> 391 U.S. at 401 n. 14.

<sup>9</sup> Note 6 above and other cases cited.

dians at the time of the treaty understood the treaty to mean. We think this Court said as much in *Puyallup I*, 391 U.S. at 397-8, and this has indeed been the approach of those cases (other than Washington's) which have been decided since *Puyallup I*.

The first Indian fishing case after *Puyallup I* was the *Sohappy* case.<sup>10</sup> In that decision, the U.S. District Court in Oregon, applying this Court's *Puyallup I* rule, held in a well-reasoned opinion that the upstream Indians, fishing outside their reservation, were entitled to take a "fair share" of the fish run, and that the state had to restrict non-Indian fishing downstream in order to allow a reasonable number of fish to reach the Indians. The state never appealed, and has attempted to comply with the ruling.

In the *Jondreau* case<sup>11</sup> the Michigan Supreme Court agreed with the Idaho rule (see note 2 above) that the state has no power to regulate off-reservation rights at all.

In the *Leech Lake*<sup>12</sup> case, a federal district court in Minnesota held that the Indians had fishing rights on state and federal public lands within an "opened" reservation, and indicated that Public Law 280<sup>13</sup> prevented the state from having regulatory jurisdiction over them.

<sup>10</sup> *Sohappy v. Smith* (also *United States v. Oregon*), 302 F. Supp. 899 (D.Ore. 1969).

<sup>11</sup> *People v. Jondreau*, 384 Mich. 539, 185 N.W.2d 375 (1971). This view, though apparently inconsistent with this Court's decision in *Puyallup I*, has been supported elsewhere. See Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 Wash. L. Rev. 207, 218 (1972).

<sup>12</sup> *Leech Lake Band v. Herbst*, 334 F.Supp. 1001 (D.Minn. 1971).

<sup>13</sup> 67 Stat. 588, 18 U.S.C. § 1162(b), now 25 U.S.C. § 1321(b). This Act transferred jurisdiction over reservations in Minnesota (and certain other states) to the state, except that this was not to deprive any tribe "of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunt-

In the *Gurnoe* case,<sup>14</sup> the Wisconsin Supreme Court held that the Indians had off-reservation fishing rights, and remanded the case to give the state an opportunity to prove that its regulations were "necessary" for conservation. It is not yet clear whether that state will follow the traditional rule of construction as *Sohappy* did, or a narrow, grudging approach, as the Washington court below did.

The most recent case and, with *Sohappy* perhaps the best reasoned case, is the *Tinno* case,<sup>15</sup> wherein the Idaho Supreme Court held that the Indians have off-reservation treaty fishing rights and that the state cannot restrict them unless it proves the restrictions are necessary for conservation. While this language is technically the same as that of the court below (and of this Court),<sup>16</sup> the attitude, like that of *Sohappy*, is the traditional one of favorable construction of the treaty rights (see note 6 above). The *Tinno* court also referred to the "fair share" concept.<sup>17</sup>

Another major case is about to be tried in the federal court in Seattle, *United States v. Washington*, Civ. No. 9213, W.D.Wash. Some of the issues will presumably be settled by this Court's decision in the instant case, but many will not.

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ing, trapping, or fishing or the control, licensing, or regulation thereof." 334 F.Supp. at 1005. See *Menominee Tribe v. United States*, 391 U.S. 404, 410-411 (1968).

<sup>14</sup> *State v. Gurnoe*, 53 Wis.2d 390, 192 N.W.2d 892 (1972).

<sup>15</sup> *State v. Tinno*, 94 Ida. 759, 497 P.2d 1386 (1972).

<sup>16</sup> The Idaho court implicitly recognized that its earlier decision in *Arthur* (see note 2 above), that the state had no jurisdiction to regulate, was apparently modified by *Puyallup I*. The court did draw a distinction between an exclusive right, as was involved in *Tinno* and *Arthur*, and an in-common right, as in *Puyallup*, *Tulee*, etc., See note 11 above.

<sup>17</sup> 497 P.2d at 1394, as did *Sohappy*, 302 F.Supp at 911.

### III. The Fair Share Concept Is The Only Sound Solution to the Problem of Defining Indian Treaty Fishing Rights

The *Sohappy* and *Tinno* cases (notes 10 and 15 above) point the way to a sound resolution of the fishing rights controversies between treaty tribes and state agencies that have plagued the Northwest in recent years. These Indians since time immemorial have fished certain streams for subsistence and trade, and by treaty they reserved the right to continue to do so, as part of the consideration for their agreement to vacate vast land areas for non-Indian settlement. *Sohappy* and *Tinno* recognize this. As this Court has required in cases dealing with reserved Indian water rights,<sup>18</sup> no less than sufficient fish to fulfill this purpose would comport with the Indians' reserved fishing rights. No less is fair to the Indians as a user group. Totally ignoring these legal rights secured by federal treaty, the State of Washington has prohibited any Indian net fishing for steelhead, denying the Indians any share of the fishery at all. The state agencies must be charged with assuring a fair share of the total fishery to the Indians in accordance with the treaty purpose.

Once it has been decided that the Indians are entitled to a fair share of the fish, most of the superficial issues disappear. For example, what difference does it make whether the Indians fish with long nets, or during closed season, or commercially, so long as they take no more fish than their tribal allocation?

<sup>18</sup> See *Winters v. United States*, 207 U.S. 564 (1908), where this Court recognized Indian water rights, notwithstanding that there was no express treaty or statutory reservation of water rights. See also *Arizona v. California*, 373 U.S. 546 596-601 (1963); *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 821 (9th Cir. 1956), cert. den. 352 U.S. 988; 330 F.2d 897 (9th Cir. 1956); 338 F.2d 307 (9th Cir. 1964), cert. den. 381 U.S. 924; *Aschenbrenner, State Power and the Indian Treaty Right to Fish*, 59 Cal.L.Rev. 485 (1971).

The problem is allocation, not conservation. Conservation is concerned only that enough fish survive to regenerate the species. All agree that this minimum number must get through. But above this minimum number the problem is allocation—who gets the surplus? The court below gave the Indians a zero share of the surplus simply because the sportsmen used up what was allegedly the entire surplus available. This is a sorry disregard of the Indians' treaty right to take fish, and we are confident that this Court will not let it stand.<sup>19</sup>

As a postscript, we would think that quite aside from any treaty rights, the Indians who have traditionally fished certain streams since time immemorial might well have a right of fishery by prescription, one that would support an injunction against other fisheries that threatened to extinguish the Indian fishery.<sup>20</sup> Even if not, it would seem that their long-standing user would give them as much right as the commercial and sports fishermen to a share of the fish.<sup>21</sup> In either case, it would seem that a state rule permitting the commercial and sports fisheries to take all the surplus fish would be discriminatory against the Indians, and a denial of Equal Protection.

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<sup>19</sup> At one of the tense confrontations between the Indians and state officials, an Indian said the Game Department "must think the steelhead swam over behind the Mayflower." Aberdeen (Wash.) Daily World, Jan. 22, 1964.

<sup>20</sup> We have found no case so holding, but generally, see 35 Am. Jur., *Fish & Game*, § 8 (1967); Annot., 47 A.L.R.2d 381, 400 (1956); *Chalker v. Dickinson*, 1 Conn. 382, 6 Am.Dec. 250 (1815); cf. *Damon v. Hawaii*, 194 U.S. 154 (1904). For analogy to water rights, see *Winters v. United States*, note 18 above.

<sup>21</sup> Cf. *Fisher v. Everett*, 66 F. Supp. 540 (D. Alaska 1945); *Greauz v. Hatchette*, 164 F. Supp. 102 (D.V.I. 1958); Hobbs, *Indian Hunting and Fishing Rights I*, 32 Geo. Wash. L. Rev. 504, notes 24 and 25 (1964).

#### IV. Implementation of the Fair Share Concept Requires Attention to Due Process Problems

Once the basic problem is recognized as one of allocation, the remaining problem is determining how the allocating gets done. Thus far, the Game Department has not considered formal allocations as such, but has relied on certain rules to cut down the number of fish that are taken. For example, fishing for steelhead is allowed only on certain days, or only with rod and reel (which is very inefficient for anyone but a sportsman who is willing to fish all day in hopes of catching one fish).

The Game Department should be instructed to make a specific allocation of steelhead to the Puyallup Tribe. However, in view of the past record of that Department, the Indians should not only have the right to be heard before the Game Department in the decision-making process, but they should have representation on that agency itself, just as the sports interests do.<sup>22</sup> Your amici hope that this Court will specify these safeguards as a minimum required by Due Process in the adjudication of treaty rights. Each tribe's situation, and hence its fair share of the total catch, will differ, depending on prior tribal experience and customs, population, geography, present fisheries by others, impact on others, etc. Each situation will require evidentiary development and a fair weighing of equitable considerations; hence the

<sup>22</sup> In Washington, the Department of Game represents the sports interests. Washington is unique in that the Game Department is a self-supporting organization, receiving its revenue from the sale of hunting and fishing licenses, plus a little federal aid. *Hearings on S.J. Res. 170 and 171, Re Indian Fishing Rights, Before Subcommittee on Indian Affairs, Senate Committee on Interior Affairs*, 88th Cong. 2d Sess. (Aug. 5 and 6, 1964) at p. 29. The Game Department is headed by a six-man commission appointed by the Governor. The Sportsman's Council of Washington (a private association) recommends names, and the Governor normally picks from the Council's list. American Friends Service Committee, *An Uncommon Controversy*, at pp. 115-116 (N.C.A.I. 1967).

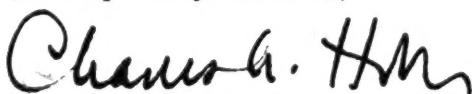
need for a fair hearing and representation on the allocating agency.

Once the allocations are made, it would be up to the tribe to regulate its members in realizing that allocation.<sup>23</sup>

### CONCLUSION

The judgment below should be reversed, with instructions to adopt and implement the fair share concept.

Respectfully submitted,



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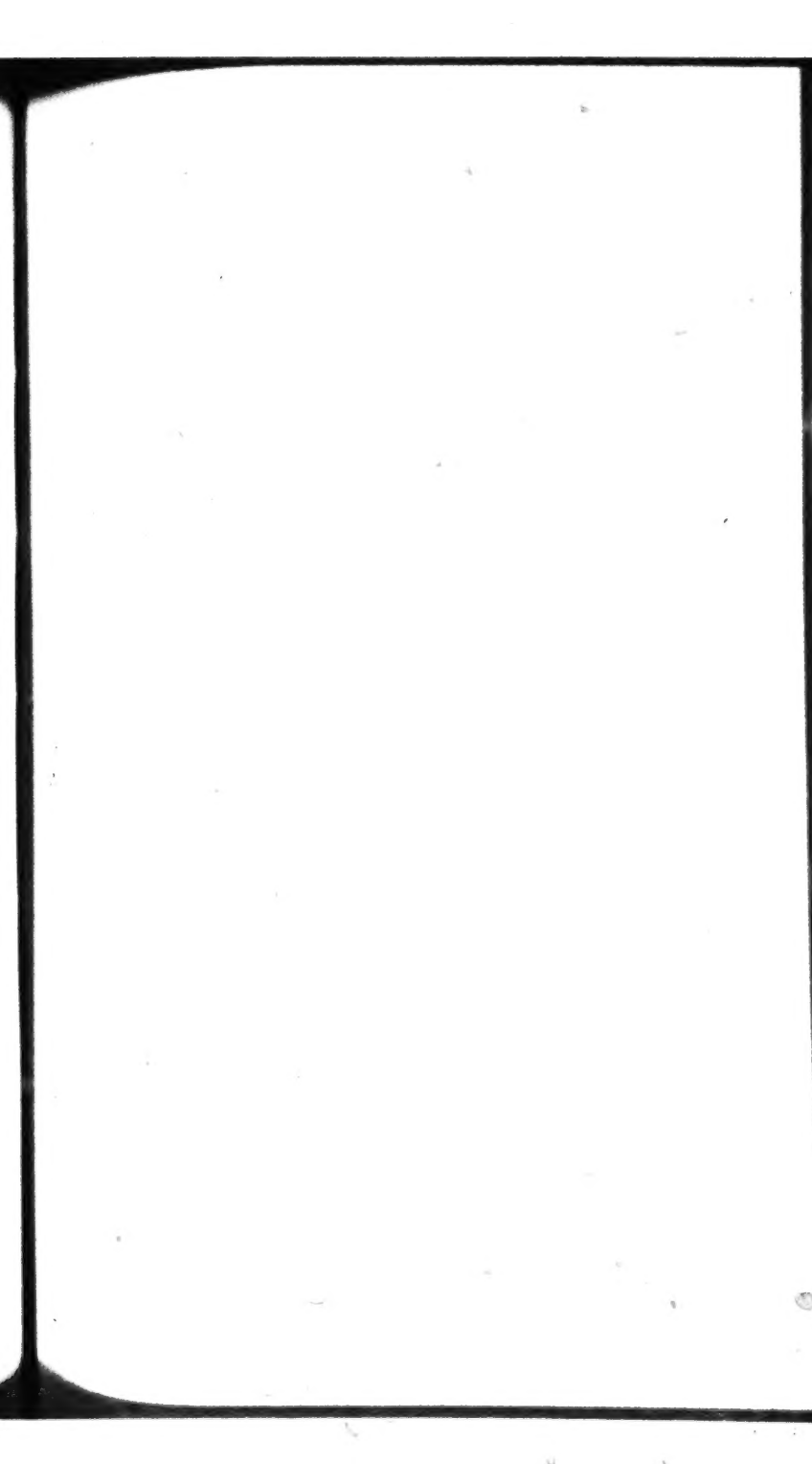
WILKINSON, CRAGUN & BARKER  
*Of Counsel*

June 26, 1973

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<sup>23</sup> *State v. Gowdy*, 1 Ore. App. 424, 462 P.2d 461 (1969), held that an Indian fishing outside the reservation at a time closed to fishing by tribal regulation, lost his immunity from state regulations. See also *Settler v. Yakima Tribal Court*, Civil No. 2378, E.D. Wash., May 5, 1971 (unpublished) (on remand from 419 F.2d 486), where the U.S. District Court held that the Yakima Tribal Court could properly punish a tribal member for violating tribal fishing regulations outside the reservation.





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**Nos. 72-481 and 72-744**

**In the Supreme Court of the  
United States**

**OCTOBER TERM, 1972**

**THE DEPARTMENT OF GAME OF THE STATE OF  
WASHINGTON, PETITIONER**

**v.**

**THE PUYALLUP TRIBE**

**THE PUYALLUP TRIBE, PETITIONER**

**v.**

**THE DEPARTMENT OF GAME OF THE STATE OF  
WASHINGTON**

**ON WRITS OF CERTIORARI TO THE SUPREME COURT OF  
THE STATE OF WASHINGTON**

**BRIEF OF THE CONFEDERATED BANDS AND TRIBES  
OF  
THE YAKIMA INDIAN NATION  
(AMICUS CURIAE)**

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1972**

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**Nos. 72-481 and 72-746**

**THE DEPARTMENT OF GAME OF THE STATE OF  
WASHINGTON, PETITIONER**

**v.**

**THE PUYALLUP TRIBE**

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**... THE PUYALLUP TRIBE, PETITIONER**

**v.**

**THE DEPARTMENT OF GAME OF THE STATE OF  
WASHINGTON**

---

***ON WRITS OF CERTIORARI TO THE SUPREME COURT OF  
THE STATE OF WASHINGTON***

---

**BRIEF OF THE CONFEDERATED BANDS AND TRIBES  
OF  
THE YAKIMA INDIAN NATION  
(AMICUS CURIAE)**

---

## **CONSENT**

This brief is filed with the consent of both parties.

## **STATEMENT OF INTEREST**

The Confederated Bands and Tribes of the Yakima Indian Nation has an important interest in the outcome of this matter. It is evident from the granting of certiorari on petitions filed by both parties, that the power of states to regulate off-reservation Indian treaty fish-

eries is under serious review.<sup>1</sup> We are concerned that the facts of the instant case may produce a judicial determination that is contrary to reservation of Indian rights and residual Indian sovereignty or that should not be controlling in other areas.<sup>2</sup> We had in our first *brief amicus* informed the court that the Yakima Indian Nation, the largest recognized tribe in the State of Washington, in exercise of its reserved rights and residual sovereignty has regulated its off-reservation treaty fisheries for many years.<sup>3</sup> At the time of our first brief, the courts had never held in any of the many cases where Yakima Indians had been arrested by state authorities that Yakima members fishing in conformity with these regulations had impaired the fishery or that the state's regulations were "necessary for the conservation of the fishery". This is true today. The courts have still continued to find that Yakima members fishing in conformity with the Yakima Nation's conservation

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<sup>1</sup> Legal writers have suggested this is long overdue. See "The States versus Indian off-reservation Fishing: An United States Supreme Court Error", *Washington Law Review*, Volume 47, page 207 (1972).

<sup>2</sup> The Yakima Nation has retained 1,117,232.62 acres or 90% of its reservation in Indian ownership. It likewise maintains a strong tribal government, conservation practices enforcement officers and has a history of Tribal regulation of its treaty fisheries. A decision that would turn on facts showing a breakdown of tribal government and regulation should clearly indicate that it does not affect tribes like the Yakima Nation or those similarly situated. Statistics from Bureau of Indian Affairs Data.

<sup>3</sup> Reference is made to our brief filed March 1, 1968 in Docket 247, October Term, 1967. Attention to said brief is invited.

regulations were being illegally restricted by State action.<sup>1</sup> The Federal Courts have likewise upheld the arrest and conviction in tribal court of tribal members violating our conservation regulations at "usual and accustomed places" off the reservation.<sup>2</sup> When the court has ruled on the merits in these cases it held that it is an inherent tribal matter. The Yakima Nation now has a membership of over 6,000 members and it is estimated that 2,000 use the treaty fisheries — on and off the Yakima Reservation — to earn or supplement their livelihood.<sup>3</sup> In spite of this exercise of reserved treaty rights and though the United States in the council negotiating *The Yakima Treaty* promised economic parity with non-Indian neighbors, great economic dis-

<sup>1</sup> *United States v. Oregon*, 304 F. Supp. 899 (D. Oregon 1969).

<sup>2</sup> *Alvin Settler v. Yakima Tribal Court*, Civil No. 2378, *Alvin Settler v. Wilson LaMeer, et al*, Civil No. 2454, *Mary Settler v. Wilson LaMeer, et al*, Civil No. 2453. Habeas corpus actions in Federal District Court, Eastern District of Washington, all unreported.

<sup>3</sup> Interrogatories of Louis Cloud, Yakima Tribal Council Fish Committee Chairman, in *U. S. v. Washington*, Docket Number 9213, Eastern District of Washington, 1972.

A survey in 1942 indicated that the annual family consumption was 1,611 pounds. Edward G. Swindell, *Report on Source, Nature, and Extent of the Fishing, Hunting, and Misc. Related Rights of Certain Indian Tribes in Washington and Oregon together with Affidavits Showing Location of a Number of Usual and Accustomed Fishing Grounds and Stations*, Division of Forestry and Grazing, Office of Indian Affairs, U. S. Department of Interior, Los Angeles, California, 1942, page 14.

Later data in 1957 indicated that 78% of the on reservation male members and 32% on reservation female members fished off reservation and landed approximately 1.7 million dollars at 1957 prices. *The Socio-Economic Status of the Yakima Nation*, Washington State University Stations Circular 397, 1961, page 31 et. seq.



partity still exists.<sup>1</sup> Continued exercise and expansion of this reserved treaty right to fish is necessary if the treaty negotiations promise to provide for a viable Indian community on the Yakima Reservation, are to be kept.<sup>2</sup>

### ARGUMENT

The failure of the treaty provisions reserving the right to fish to specify the method or manner of fishing in the articles drawn by the United States should not be charged against the Indians. There is no more often repeated principle of Indian law than that language used in treaties with Indians should never be construed to their prejudice and that they should be interpreted as understood by these unlettered people rather than by their critical meaning.<sup>3</sup> To hold — that Indians

<sup>1</sup> The annual median family income of the Yakima members is \$4,940.00 with 23% of these families living on less than \$2,000.00. The average per capita income is \$1,100.00. This compares unfavorably with the median family income for all families in the State of Washington over \$10,000.00 and the per capita income state wide of \$4,148.00 and nationally of \$4,156.00. Unemployment is 28% which compares unfavorably with the state figure of 8.9%. The median education level for those over 25 years is 10.1 years in comparison with the state median average of over 12 years. *Pocket Data Book*, Office of Program Planning and Fiscal Management, State of Washington 1972; *An Economic Analysis of the Labor Market for the Yakima Indian Nation*, Pacific Northwest Laboratories, Battelle, 1973.

<sup>2</sup> Record of Proceedings, Walla Walla Treaty Council, 1855.

<sup>3</sup> *United States v. Winans*, 198 U.S. 371 (1905); *Jones v. Meehan*, 175 U.S. 1 (1899); *Winters v. United States*, 207 U.S. 564 (1908); *Worcester v. Georgia*, 6 Pet. 515 (1832); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

exercising their reserved treaty right must use a hook and line — would virtually abrogate this accepted rule of treaty interpretation. This method was almost unused at treaty times.<sup>1</sup>

The doctrine of residual sovereignty of Indian tribes, and particularly with whom the United States made treaties, has been preserved in decisions to the present term.<sup>2</sup> The reserved right to fish at usual and accustomed places is a tribal rather than an individual right.<sup>3</sup> While it may be that Indians who are fishing without or in violation of tribal regulation are subject to state regulation,<sup>4</sup> Indians fishing in conformity with tribal conservation regulation should not be placed in the same category. Any state regulation of a tribally regulated fishery infringes on the right of Indian tribes to make their own laws and to be regulated by them.<sup>5</sup>

<sup>1</sup> *Swindell, supra*.

<sup>2</sup> *McClanahan v. State Tax Commission of Arizona*, 41 LW 4457 (1973).

<sup>3</sup> *Whitefoot v. United States*, 293 F.2d 658 (Ct. Cl. 1961).

<sup>4</sup> The United States Attorney, Western District of Washington expressed the opinion in 1968 that an Indian fishing in violation of tribal ordinance is not correctly exercising the tribal treaty right and is therefore subject to state prosecution. See brief amicus in *Department of Game v. Settler*, Superior Court for Skamania County (1968). This court in its decision in *Puyallup* apparently is following this rationale. See also *State v. Gowdy*, 1 Ore. App. 424, 462 P.2d 461.

<sup>5</sup> Federal Judge Charles Powell, Eastern District of Washington in *Settler v. Yakima Tribal Court*, unreported, has held that it is within the inherent power of the Yakima Nation to arrest and punish fishing in violation of tribes conservation regulation at off-reservation fisheries. Copy filed with the clerk of this court.

States may not interfere with this right except where Congress has so provided.<sup>1</sup> Congress has not so provided. The Yakima Nation realizes that if they fail to accept this responsibility the Secretary of Interior may act under existing regulations, Congress may act, or fish runs will be reduced. The Yakima Nation fully intends to accept its responsibility for all of these alternatives would be a limitation of its reserved treaty right and residual sovereignty. These rights are important tribal rights. The Yakima Nation continues to exercise this right to allow for a treaty off-reservation fishery to provide for its members who find themselves — contrary to promises at treaty times — among the most deprived group of people in our nation. Just as important is the right and duty of the Yakima Nation to maintain these treaty fisheries for those Yakimas yet unborn. A treaty right in a non-existent fishery is no right at all. The Yakima Nation dedicates itself to the protection of these fisheries in spite of all the non-Indian caused handicaps of non-screened irrigation diversions, power dams, pollution, and spawning ground destruction.

Likewise the doctrine of federal pre-emption, pre-empts state regulation of tribal treaty off-reservation

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<sup>1</sup> This court has so held in cases from *Worcester v. Georgia*, *supra* to *McClanahan v. Arizona Tax Commission*, *supra*.

fisheries.<sup>1</sup> Regulation of the Secretary of Interior provide that on his own motion, or upon the request of an Indian tribe or state governor, and upon the finding that there is a need for such regulation to assume the conservation and wise utilization of the resource; that off reservation fisheries may be regulated by the Federal Government.<sup>2</sup> No state has petitioned for such regulation nor has the Secretary found that such regulation is necessary to satisfy the aims of conservation or wise utilization of the off-reservation fisheries resource.

We do not believe that either the location of these treaty fisheries off-reservation or within the exterior boundaries of a state or the phrase "in common with" to be controlling in this cause. The reservation of these fisheries off-reservation took place many years before Washington was a state. A reservation exists and that is the reservation of the tribal right to fish.<sup>3</sup> Complementing this reserved right is the existence of residual sovereignty to regulate this right.<sup>4</sup>

The State of Washington should not be able to regulate the fishermen of the Yakima Indian Nation or

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<sup>1</sup> Again see *McClanahan v. Arizona Tax Commission*, *supra*, for discussion of this doctrine.

<sup>2</sup> 25 CFR Part 256 promulgated in 1967.

<sup>3</sup> *United States v. Winans*, *supra*. When the State of Washington was admitted to the Union, it accepted these reservations of rights.

<sup>4</sup> See footnote discussing *Settler v. Yakima Tribal Court*, *supra*.

those tribes similarly situated. The State of Washington can protect any legitimate interest they have in any Yakima off-reservation fishery. Among the options open to it are:

1. Work with the tribes involved to insure that the tribal regulations prescribe adequate protection of the fishery;<sup>1</sup>

2. Enter into an agreement with the Yakimas to provide for a joint regulatory board to regulate the fishery;<sup>2</sup>

3. Petition the Secretary of Interior to regulate the fishery if the conservation and the wise use of the fishery is not preserved;<sup>3</sup>

4. Petition Congress for legislation providing for delegation to the states of off-reservation Indian fisheries.<sup>4</sup>

---

<sup>1</sup> We had the help of the State of Oregon agencies in the late sixties in this regard. It was very helpful. The Washington State Department of Fisheries is beginning to do this with tribes in the Puget Sound area.

<sup>2</sup> This form of regulation has existed on the Klickitat River since 1952 with the Department of Fisheries.

<sup>3</sup> Questions to the Department of Game would undoubtedly show that they would probably rather let the fisheries be impaired than to give up what they call their "prerogative".

<sup>4</sup> This was tried in 1964. A reading of the Hearings on SJR 170 and SJR 171, 88th Congress 2nd Session, August 5-6, 1964, will show why Congress was unimpressed. Also note that Public Law 83-280, (67 Stat. 588) reserves jurisdiction over treaty rights in the Federal Government and the tribes. Congress repeated its position in 1968. (Public Law 90-284).

**CONCLUSION**

The opinion in this case should clearly indicate that tribes maintaining a tribal government and a regulated tribal fishery should not be subject to state regulation.

**DATED: June 22, 1973.**

Respectfully submitted,  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1972

Nos. 72-746 and 72-481

THE PUYALLUP TRIBE, *Petitioner,*

v.

THE DEPARTMENT OF GAME OF THE STATE OF  
WASHINGTON, *Respondent.*

THE DEPARTMENT OF GAME OF THE STATE OF  
WASHINGTON, *Petitioner,*

v.

THE PUYALLUP TRIBE, *Respondent.*

On Writs of Certiorari to the Supreme Court of the  
State of Washington

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE  
AND BRIEF OF AMICI CURIAE  
RAMONA C. BENNETT  
MUCKLESHOOT INDIAN TRIBE  
SQUAXIN ISLAND TRIBE OF INDIANS  
NISQUALLY INDIAN COMMUNITY  
SAUK-SULATTLE INDIAN TRIBE

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1972

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Nos. 72-746 and 72-481

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THE PUYALLUP TRIBE, *Petitioner*,

v.

THE DEPARTMENT OF GAME OF THE STATE OF  
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THE DEPARTMENT OF GAME OF THE STATE OF  
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THE PUYALLUP TRIBE, *Respondent*.

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On Writs of Certiorari to the Supreme Court of the  
State of Washington

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

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Ramona C. Bennett, the Muckleshoot Indian Tribe,  
the Squaxin Island Tribe of Indians, the Nisqually  
Indian Community, and the Sauk-Suiattle Indian Tribe

respectfully move for leave to file the attached brief amici curiae in this case. The consent of the Solicitor General, representing the Puyallup Tribe, has been obtained. The consent of the attorney for the Department of Game of the State of Washington has been requested but was refused, although counsel has been assured there will be no opposition to this motion.

The interest of Ramona C. Bennett arises from the fact that she is a member of the Puyallup Indian Tribe and serves on the Puyallup Tribal Council. Further, she is the conditional cross petitioner in No. 72-5437, seeking review of the decision of the Washington State Supreme Court which is here under review. Ms. Bennett had requested that her petition be granted only if the petition of the Department of Game (No. 72-481) should be granted. That petition was granted March 19, 1973, but at the conclusion of the Court's 1973 term, Ms. Bennett's petition was still pending. Ms. Bennett was an intervenor in the remand proceedings below and actively participated through her legal counsel in the superior court and state supreme court proceedings. She is concerned as a Puyallup Indian who fishes herself with being able to exercise treaty fishing rights at the tribe's usual and accustomed places. The extent to which Ms. Bennett, her family, and her fellow tribal members are able to exercise their treaty secured rights free from state infringement may be determined by the Court's decision in this case.

The Squaxin Island Tribe of Indians and the Nisqually Indian Community located in Western Washington are parties to the Medicine Creek Treaty, 10 Stat. 1132, December 26, 1854, to which the Puyallup Indian Tribe is also a party. The Nisqually's fishing rights were the subject of this Court's decision in

*Kautz v. Department of Game* (No. 319) which was consolidated with and decided under the name *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968). The decision of the *Puyallup* case on remand was appealed, decided by the Washington Supreme Court, and is now before the Court in this case.

The Muckleshoot Indian Tribe and the Sauk-Suiattle Indian Tribe are located in Western Washington and are parties to the Treaty of Point Elliott, 12 Stat. 927, January 22, 1855. This treaty and several others negotiated in 1854 and 1855 between the Indian tribes of the Northwest and the United States by Governor Isaac Stevens reserve to the Indian tribes in language virtually identical to that in Article III of the Treaty of Medicine Creek the right to continue fishing at their usual and accustomed places.<sup>1</sup>

To the extent that a decision in this case rests upon an interpretation of the language in the Medicine Creek Treaty relating to fishing, it will affect the rights of each of the amici tribes. They each have several members whose fishing is a vitally important source of food and income for them and their families. In addition, the continued maintenance of their traditional fishing culture is the key to preserving tribal and ethnic identity for these and other Northwest fishing tribes.<sup>2</sup>

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<sup>1</sup> Article III of the Treaty of Medicine Creek provides, in pertinent part,

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory . . . .

<sup>2</sup> See generally, American Friends Service Committee, *Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup and Nisqually Indians* (1970).

The tribes and Ms. Bennett here bring to the Court's attention and discuss the following matters:

1. The reasoning in this Court's decisions relating to other reserved Indian rights is applicable to the treaty reserved Indian fishing right.

2. Tribal and federal regulation of the fishery must be considered before a determination of necessity for conservation (as required by this Court's earlier decision) can be made.

3. Restriction of Indian fishing is "necessary" only after other means of achieving conservation goals are shown to be inadequate.

4. Determinations of conservation necessity should be made (a) in advance of enforcement of state laws, and (b) by a federal court.

The matters discussed in this brief, while consistent with the arguments, which will be advanced on behalf of the Puyallup Tribe, will not be as fully explicated elsewhere.

Respectfully submitted,

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NATIVE AMERICAN RIGHTS FUND  
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June, 1973

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1972

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Nos. 72-746 and 72-481

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THE PUYALLUP TRIBE, *Petitioner*,

v.

THE DEPARTMENT OF GAME OF THE STATE OF  
WASHINGTON, *Respondent*.

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THE DEPARTMENT OF GAME OF THE STATE OF  
WASHINGTON, *Petitioner*,

v.

THE PUYALLUP TRIBE, *Respondent*.

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On Writs of Certiorari to the Supreme Court of the  
State of Washington

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BRIEF OF AMICI CURIAE  
RAMONA C. BENNETT  
MUCKLESHOOT INDIAN TRIBE  
SQUAXIN ISLAND TRIBE OF INDIANS  
NISQUALLY INDIAN COMMUNITY  
SAUK-SUIATTLE INDIAN TRIBE

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INTEREST OF AMICI CURIAE

The interests of amici curiae Ramona C. Bennett, the Muckleshoot Indian Tribe, the Squaxin Island Tribe of Indians, the Nisqually Indian Community,

and the Sauk-Suiattle Indian Tribe are set forth fully in the Motion for Leave to File Brief Amici Curiae which accompanies this brief.

### SUMMARY OF ARGUMENT

This Court's earlier decision in this case<sup>1</sup> has prompted diverse interpretations by state and federal courts<sup>2</sup> and by scholars.<sup>3</sup> Articulation of further guidelines for the manner in which courts should make determinations of necessity for conservation—the prerequisite for state regulation of Indian treaty fishing—is needed. In addition to the need for guidelines for treaty interpretation, the prescription of specific procedures for making these determinations in advance of their enforcement is in order.

Amici urge that this Court's treatment of cases requiring determinations of the extent of other reserved rights held by Indians is applicable here. Secondly, because the state has power to regulate only for conservation necessity, the exercise of such power should be as a last resort. Further, it is argued that tribal and federal regulations must be considered before a state

<sup>1</sup> *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968).

<sup>2</sup> *E.g.*, *Department of Game v. Puyallup Tribe*, 80 Wash.2d 561, 497 P.2d 171 (1972); *State v. Tinno*, 94 Ida. 759, 497 P.2d 1386 (1972); *State v. Satiacum*, 80 Wash.2d 492, 495 P.2d 1035 (1972), petition for cert. filed, 41 U.S.L.W. 3301 (U.S., Oct. 15, 1972) (No. 72-552); *State v. Moses*, 79 Wash.2d 104, 483 P.2d 832 (1971), cert. denied 406 U.S. 910 (1972); *State v. Gurnoe*, 53 Wis.2d 390, 192 N.W.2d 892 (1972); *People v. Jondreau*, 384 Mich. 539, 185 N.W.2d 375 (1971); *Sohappy v. Smith*, 302 F.Supp. 899 (D. Ore. 1969).

<sup>3</sup> See, *e.g.*, Johnson, "The State v. Indian Off Reservation Fishing: A United States Supreme Court Error," 47 Wash.L.Rev. 207 (1972); Comment, "State Power and the Indian Treaty Right to Fish," 59 Calif.L.Rev. 485 (1971).

regulation can be found to be "necessary for conservation." Finally, amici urge that determinations of conservation necessity be made by a federal court before enforcement of state regulations in order to avoid suppression of Indian treaty fishing which later may be declared lawful, and to avoid a great waste of judicial resources.

### ARGUMENT

#### I. The Puyallup Tribe Has a Reserved Right to Fish at Its Usual and Accustomed Places.

The right of Puyallup tribal members to fish at usual and accustomed places outside their reservation boundaries is a right reserved by the tribe, not a right granted to it, in the Medicine Creek Treaty. Just as the tribe reserved certain lands while ceding others, it reserved the right to fish outside reserved lands. While the fishing rights were, by their terms, to be exercised at usual and accustomed places outside reserved lands, the rights being exercised are reserved rights—reservations themselves. Thus, this case must not be seen as a non-reservation case.

The reserved right notion originated with this Court's decision in *Winans v. United States*, 198 U.S. 371 (1905), in which interpretation of the same treaty language relative to fishing in a land area not retained by the tribe in its treaty was in issue. The Court held:

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed . . . . [T]he treaty was not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted. And the form of the instrument and its

language was adopted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals . . . . They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the Territory."<sup>4</sup>

In order to decide the propriety of state regulation of Indian fishing, it is essential to have clearly in mind the nature and extent of the Indians' right. For this reason, the fact that Indian treaty fishing rights are reserved rights has an important bearing upon any determination of the extent of state regulatory power.

This Court has had occasion to deal with the question of the extent of reserved rights a number of times, especially in the area of Indian water rights. *Winters v. United States*, 307 U.S. 564 (1938), is the leading case on reserved Indian water rights. The Court there held that reserved water rights exist to the extent necessary to fulfill the purposes of the reservation. The *Winters* decision, which was authorized by Justice McKenna, who wrote the *Winnans* decision three years earlier, has been followed consistently for sixty-five years. For instance, in *Arizona v. California*, 373 U.S. 546 (1963), this Court held that Indian reservations along the Colorado River have a right to sufficient waters from that river to meet all of their present and future needs. This result was required in order to fulfill the purpose of the reservations which was found to be to enable agricultural development by the Indians.<sup>5</sup> Therefore, the measure of the right was the amount of water needed to irrigate all irrigable acreage held

<sup>4</sup> 189 U.S. at 381.

by the tribes. If that left little or even no water for the white settlers, that was the inevitable consequence of the treaty \* which, after all, made possible the settlement of the Northwest.

In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), this Court found that:

The purpose of creating a reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining, and advance to the ways of civilized life.'

In accord with this purpose, the Indians were held to have rights not only to the lands specifically reserved to them, but to the adjacent fishing grounds. In so holding, the Court looked to the circumstances in which the reservation was created including "the power of Congress in the premises, the location and character of the lands, the situation and needs of the Indians, and the object to be obtained."'

The purpose of including a clause in each of the treaties negotiated by Governor Isaac Stevens with the several Northwest Indian Tribes in 1854 and 1855 has been discussed in several cases.' For instance, this

\* 373 U.S. at 600.

' See *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 327 (9th Cir. 1956), cert. denied 352 U.S. 988; 330 F.2d 897 (9th Cir. 1956); 338 F.2d 307 (9th Cir. 1964), cert. denied 381 U.S. 924.

' 248 U.S. at 89.

' 248 U.S. at 87.

' The historical dependence of Indians who were parties to the Stevens Treaties upon fishing for their subsistence and livelihood was well articulated by the United States District Court in Oregon:

From the earliest known times, up to and beyond the time of the treaties, the Indians comprising each of the intervenor

Court has stated, "We are impressed by the strong desire the Indians had to retain the right to hunt and

tribes were primarily a fishing, hunting and gathering people dependent almost entirely upon the natural animal and vegetative resources of the region for their subsistence and culture. They were heavily dependent upon such fish for their subsistence and for trade with other tribes and later with the settlers. They cured and dried large quantities for year around use. With the advent of canning technology in the latter half of the 19th Century the commercial exploitation of the salmonid resource by non-Indians increased tremendously. Indians, fishing under their treaty-secured rights, also participated in this expanded commercial fishery and sold many fish to non-Indian packers and dealers.

During the negotiations which led to the signing of the treaties the tribal leaders expressed great concern over their right to continue to resort to their fishing places and hunting grounds. They were reluctant to sign the treaties until given assurances that they could continue to go to such places and take fish and game there. The official records of the treaty negotiations prepared by the United States representatives reflect this concern and also the assurances given to the Indians on this point as inducement for their acceptance of the treaties.

*Sohappy v. Smith*, 302 F.Supp. 899, 907 (D. Ore. 1969). The Idaho Supreme Court has also taken cognizance of the treaty purposes:

The gathering of food from open lands and streams constituted both the means of economic subsistence and the foundation of a native culture. Reservation of the right to gather food in this fashion protected the Indians' right to maintain essential elements of their way of life, as a complement to the life defined by the permanent homes, allotted farm lands, compulsory education, technical assistance and pecuniary rewards offered in the treaty. Settlement of the west and the rise of industrial America have significantly circumscribed the opportunities of contemporary Indians to hunt and fish for subsistence and to maintain tribal traditions. But the mere passage of time has not eroded the rights guaranteed by a solemn treaty that both sides pledged on their honor to uphold. As part of its conservation program, the State must extend full recognition to these rights, and the purposes which underlie them.

*State v. Tinno*, *supra*, 94 Ida. at 766, 497 P.2d at 1393.



fish in accordance with the immemorial custom of their Tribes.”<sup>10</sup> From these discussions, it is clear that the Indians intended to be able to continue fishing as they had before the treaties in order to maintain their livelihood and cultural identity. Thus, amici submit that the right extends to sufficient fish to meet subsistence and trading needs. No less would fulfill the treaty’s purpose.

Of course, the right cannot and should not extend so far as to permit the waste of fish.<sup>11</sup> And it is logical that the right does not permit harvesting fish in excess of the number which safely can be taken consistent with the escapement necessary to perpetuate the resource. Apparently in recognition of this latter limitation, and of the fact that the states are generally charged with management and regulatory power over fish and game within their boundaries,<sup>12</sup> this Court held that “the overriding police power of the State, expressed in non-discriminatory measures for conserving fish resources, is preserved.”<sup>13</sup> In order to put to rest any doubt about the manner in which that police power may be exercised, we urge this Court to provide the State of Washington with guidance as to the extent of the treaty rights held by the Puyallup Tribe.

Articulation of the standard by which reserved rights are measured—sufficient to fulfill the purposes of the reservation—will provide the state and the courts with

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<sup>10</sup> *Tulee v. Washington*, 315 U.S. 682, 684 (1942).

<sup>11</sup> Compare, *State v. Satiacum*, *supra*.

<sup>12</sup> *Geer v. Connecticut*, 161 U.S. 519 (1896).

<sup>13</sup> *Puyallup Tribe v. Department of Game*, *supra* at 399.

a starting point for understanding the purpose and nature of the federally secured right which they seek to regulate. Misunderstanding of the Indian treaty fishing *right* has led in the past to extensive prohibition of Indian treaty fishing as a means of protecting a fishing *privilege* for other citizens. Amici believe that this state practice violates the Supremacy Clause of the Constitution in that a federal treaty is the supreme law of the land. Further, rights of individual tribal members are violated when their special rights are ignored while citizens without such rights are protected.

**II. Tribal and Federal Regulations Must Be Considered in Order to Make a Determination that Enforcement of State Laws Against Indians Is Necessary for Conservation.**

This Court has said, most recently in *Puyallup Tribe v. Department of Game*, that there is a sphere of permissible state regulation of fishing by Indians with treaty rights. The state power to regulate may be exercised, however, only when it is shown that state regulation is necessary for conservation.<sup>14</sup> Until the effect of other applicable regulatory schemes which may operate upon the fishery is considered, a determination of necessity cannot be made intelligently. This proposition is rooted not only in common sense, but in established legal principles in the case of Indian fishing. Nevertheless, the State of Washington sees its role in regulating fishing within its territory as plenary.<sup>15</sup> Regulation of Indian fishing is reposed in tribal and

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<sup>14</sup> *Id.* at 399 and 401.

<sup>15</sup> See *State v. Moses*, *supra*.

federal authority and the exercise of state power in the area must be seen as supplementary.<sup>16</sup>

To view the state's regulatory jurisdiction over Indians exercising fishing rights reserved by their tribes as primary or exclusive would raise two important, recurring issues. First, it would create an interference with the tribe's ability to govern itself. Second, the federal government's plenary authority, and possible preemptive activity, in the area would be ignored.

The collage of overlapping jurisdictions must be seen against the backdrop of a conservative Congressional attitude toward extension of state jurisdiction over Indian affairs.<sup>17</sup> Where Indians, even outside Indian country, are engaged in transactions over which Congress has asserted its constitutional power, any state interference with the exercise of this power is invalid. For example, Congress in the past has prohibited liquor sales to Indians outside Indian reservations and its exercise of jurisdiction was upheld by the

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<sup>16</sup> *Missouri v. Holland*, 252 U.S. 416 (1920), holds that the right of a state to manage game within its boundaries is not infringed by a federal treaty and regulations under it which regulate game within the state in that under the Supremacy Clause the sovereign power of the state must yield to paramount federal power.

<sup>17</sup> This Court has recognized that only express Congressional acts are effective to extend state jurisdiction over Indian country. *Mattz v. Arnett*, — U.S. —, 41 U.S.L.W. 4808 (U.S., June 11, 1973); *Seymour v. Superintendent*, 368 U.S. 551 (1962); see also *McClanahan v. Arizona Tax Comm'n.*, — U.S. —, 36 L.Ed.2d 129 (1973); *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971).

courts.<sup>18</sup> Regulation of rights secured to Indians under federal treaties a fortiori is an area in which there is a substantial federal interest. To be sure, Congress has dealt jealously with the question of allowing states to extend their jurisdiction over treaty secured Indian fishing rights. For instance, the general statute providing for the assumption of state jurisdiction over Indians specifically prohibits the exercise of state jurisdiction in such a manner as to "deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing or regulation thereof."<sup>19</sup>

#### A. The effect of the tribe's regulatory powers.

An impairment of the tribe's ability to govern its members is the result of confining to the state all regulatory power over the exercise by individual tribal members of rights reserved by the tribe in a solemn

<sup>18</sup> *Johnson v. Gearlds*, 234 U.S. 422 (1914); *Perrin v. United States*, 232 U.S. 478 (1914); *Dick v. United States*, 208 U.S. 340 (1908); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876); *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1866). This Court has recognized that federal power in these cases is not unlimited and "does not go beyond what is reasonably essential to their [the Indians] protection, and that, to be effective, its exercise must not be purely arbitrary, but founded on some reasonable basis." *Perrin v. United States*, *supra* at 486. Thus, federal power over Indian treaty fishing appropriately extends so far as is necessary to assure fulfillment of the purposes of the treaty.

<sup>19</sup> Public Law 83-280, 18 U.S.C. § 1162. Cf. *Menominee Tribe v. United States*, 391 U.S. 404 (1968), where this Court held that the intention expressed by this phrase in Public Law 83-280 indicates that treaty reserved fishing rights should survive even termination of the tribe. See also *Mattz v. Arnett*, *supra*.

treaty with the United States. This is an area in which the Puyallup Tribe has the power to regulate and which it does in fact regulate. The Constitution and By-Laws of the Puyallup Tribe providing for tribal self-government have been approved by the Secretary of the Interior pursuant to the Indian Reorganization Act.<sup>20</sup> The Puyallup Tribe, like many other treaty tribes, has exerted its regulatory powers over the exercise of fishing rights reserved in treaties.<sup>21</sup> Enforcement of the regulations is generally carried out by officers under tribal supervision. Prosecutions are handled in tribal courts with recourse to federal district courts by means of habeas corpus proceedings.<sup>22</sup> Further, fishing in violation of tribal regulations is considered to be outside the scope of the treaty right and thus subjects an Indian so fishing to prosecution for a state fishing regulation he might also be violating.<sup>23</sup>

It is well established that a state may not exercise its jurisdiction over Indians such that it "would un-

<sup>20</sup> 25 U.S.C. §§ 476 *et seq.* "To assure adequate government of the Indian tribes [Congress] enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a Department of Indian Affairs, 4 Stat. 729, 735. Not satisfied solely with centralized government of Indians, it encouraged tribal governments to become stronger and more highly organized. See, *e.g.*, the Wheeler-Howard Act, §§ 16, 17, 48 Stat. 987, 988, 25 U.S.C. §§ 476, 477." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

<sup>21</sup> See Tr. 217; see also App. 103. A copy of the tribe's current regulations has been lodged with the clerk by the Solicitor General.

<sup>22</sup> 25 U.S.C. § 1303. See also *Settler v. Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969) (habeas corpus from alleged unconstitutional prosecution for violation of tribal off reservation fishing regulations).

<sup>23</sup> *State v. Gowdy*, 1 Ore. App. 424, 462 P.2d 461 (1970); 69 I.D. 68, 70 (1962).

dermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.”<sup>24</sup> Although the case from which this language is taken involved activity between Indians and non-Indians within boundaries of an Indian reservation, it is applicable with even greater force, here where the governing authority of a tribe over its own members exercising a treaty-reserved right is frustrated by the imposition of state authority without any consideration of tribal regulations or the tribe’s jurisdiction to regulate. This Court has recently suggested in *McClanahan v. Arizona Tax Comm’n*, *supra*, that treaties be read “with this tradition of sovereignty in mind.”<sup>25</sup> To do so demands, at the least, that the state and any reviewing court take into account the effect of tribal regulations in determining whether a state regulation is “necessary” for conservation pursuant to the mandate of this Court’s decision in *Puyallup Tribe v. Department of Game*.

**B. The effect of the federal government’s regulatory activity.**

A second factor which should be considered in making a determination of the validity of any state regulation of Indian fishing is the extent to which the federal government has occupied the area of regulation. Where the government has a regulatory scheme, no state scheme of regulation operating in the same area is permitted.<sup>26</sup> Here the federal government has pro-

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<sup>24</sup> *Williams v. Lee*, *supra* at 223. See also *Warren Trading Post v. Arizona Tax Comm’n*, 380 U.S. 685 (1965); *McClanahan v. Arizona Tax Comm’n*, *supra*.

<sup>25</sup> 36 L.Ed.2d at 136.

<sup>26</sup> See *Warren Trading Post v. Arizona Tax Comm’n*, *supra*.

mulgated regulations for the fishery in question.<sup>27</sup> Just as no exercise of state power inconsistent with the language or purpose of a federal treaty is lawful, neither is the exercise of such power in an area occupied by federal regulation implementing that treaty.<sup>28</sup>

Amici submit that a state must consider federal regulation of the Puyallup fishery before it undertakes to design its regulatory scheme and that it must avoid any conflict between the two. A recognition of the conservation which may be effected by federal regulations, just as those which will be achieved by tribal regulation, will certainly have a bearing on the existence or degree of "necessity" for any state regulations.

### III. State Regulation of Indian Treaty Fishing Must be a Last Resort.

#### A. Restriction of non-treaty fishing must precede regulation of Indian fishing.

Instead of restricting citizen groups greater in number and in political power whose catch of salmonid fish account for the vast majority of fish caught each year, the State of Washington has elected to prohibit or restrict the fishing of a handful of Indians.<sup>29</sup> As the Idaho Supreme Court has recognized, treaty Indians have subsistence and cultural interests in hunting and

<sup>27</sup> 25 C.F.R. Part 256. The Executive undeniably has the power to develop regulations to implement treaties entered into by the United States.

<sup>28</sup> Cf. *Missouri v. Holland*, *supra*.

<sup>29</sup> The original record in *Puyallup Tribe v. Department of Game* reflects the fact that Indian fishermen accounted for between 3 percent and 5 percent of the total catch with the remainder being harvested by non-Indian commercial and sport fishermen. Rs.A-32, 178-79.



fishing that are rooted more deeply than the recreational interests asserted by sportsmen.<sup>30</sup>

Interpreting the earlier decision of this Court in this case, the United States District Court for the District of Oregon held that:

The state may regulate fishing by non-Indians to achieve a wide variety of management or "conservation" objectives. Its selection of regulations to achieve these objectives is limited only by its own organic law and the standards of reasonableness required by the Fourteenth Amendment. But when it is regulating the federal right of Indians to take fish at their usual and accustomed places it does not have the same latitude in prescribing the management objectives and the regulatory means of achieving them. The state may not qualify the federal right by subordinating it to some other state objective or policy. It may use its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource.<sup>31</sup>

Following this approach, amici submit that occasionally the State of Washington must shift the burdens of its "fishery management" objectives in order to avoid impairing treaty guaranteed Indian fishing rights when restrictions must be imposed on someone to insure perpetuation of fishery resources.<sup>32</sup>

<sup>30</sup> *State v. Tinno*, *supra*, 94 Ida. at 765, 497 P.2d at 1392.

<sup>31</sup> *Sohappy v. Smith*, *supra* at 908.

<sup>32</sup> This Court has indicated that because the standard by which state power to regulate treaty fishing is necessity for conservation, "the measure of the legal propriety of those kinds of conservation measures is distinct from the federal constitutional standard concerning the scope of the police power of a State." *Puyallup Tribe*

Before a state regulation of Indian treaty fishing can be found to be "necessary," amici submit that it must be the least restrictive which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes.<sup>33</sup> In order to meet this test, other avenues designed to achieve the conservation objectives must be exhausted. Making regulation of Indian treaty fishing a last resort to protect the resource stands in sharp contrast to the Washington Supreme Court's "Indians last" approach,<sup>34</sup> but is compelled by this Court's direction to that court to determine whether regulations are necessary for conservation.

**B. No problems of equal protection are created by imposing stricter regulations upon non-treaty fishermen.**

The crux of the argument posited by the Washington State Department of Game before this Court now and at the time this case was first presented is that affording any special treatment in the state regulatory scheme to Indians possessing treaty protected fishing rights would be contrary to the equal protection clause

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*v. Department of Game, supra* at 401, n. 14. Thus, more severe regulation, even prohibition, of non-treaty fishing may be proper. See also *Sohappy v. Smith, supra* at 908, 911; *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169, 174 (9th Cir. 1963); *Tulee v. Washington, supra* at 685.

<sup>33</sup> See *Sohappy v. Smith, supra* at 907.

<sup>34</sup> The Washington State Supreme Court held that "the catch of the steelhead sports fishery in the Puyallup River leaves no more than a sufficient number of steelhead for escapement" thus precluding the possibility of an Indian fishery because the river is effectively fished out by sport fishermen. *Department of Game v. Puyallup Tribe, supra*, 80 Wash.2d at —; 497 P.2d at 178-179. This approach flaunts the Supremacy Clause as well as *Missouri v. Holland, supra*, and this Court's holding in *Puyallup Tribe v. Department of Game, supra*.

of the Fourteenth Amendment to the United States Constitution. In continuing to make this contention after this Court's 1968 decision, the state points with confidence to the last sentence of the opinion which mandates that findings "on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with.'"<sup>35</sup> The state position is totally without merit. The Indians' right to fish pursuant to treaty must be contrasted to the mere *privilege* of non-treaty fishermen.<sup>36</sup> No other citizens have a right to fish. Numerous courts have considered the identical argument reiterated by this same litigant and have soundly rejected it.<sup>37</sup>

Not only is the argument advanced by the state at odds with existing law, it turns on its head the meaning of this Court's admonition concerning equal protection. The reasonable meaning of the language of the decision is that any violation of the Indians' right to equal protection should be avoided.<sup>38</sup> There are at

<sup>35</sup> *Puyallup Tribe v. Department of Game*, *supra* at 403. See Appellants Brief, pp. 8, *et seq.*

<sup>36</sup> *Geer v. Connecticut*, *supra* at 532. The extent of paramount reserved Indian rights recognized by this Court is discussed *supra* at p. 5.

<sup>37</sup> See, e.g., *Winans v. United States*, *supra* at 379-381; *Tulee v. Washington*, *supra* at 684; *Department of Game v. Puyallup Tribe*, 70 Wash.2d 245, 250, 422 P.2d 754, 757-758 (1957); *Sohappy v. Smith*, *supra* at 905; *Makah Indian Tribe v. Schoettler*, 192 F.2d 224, 226 (9th Cir. 1951); *State v. Satiacum*, 50 Wash.2d 513, 523-524, 314 P.2d 400, 405 (1957); *Maison v. Confederated Tribes of Umatilla Indian Reservation*, *supra* at 171.

<sup>38</sup> In its opinion, the Court prescribes that state regulations, where shown to be "necessary," may not "discriminate against Indians" (391 U.S. 398), and that only "non-discriminatory measures for conserving the fish resources" are proper (391 U.S. 399). Thus, read as a whole, the thrust of the opinion's equal protection language is clear.

least three distinct ways in which such equal protection violations can and do occur:

a. Recognizing no greater rights in persons with special federally established rights (Indians) than in those without such rights. Equal protection is denied to Indians who are thus unable to obtain the full protection of state law for their rights.

b. Laws which seem fair on their face but which operate to the detriment of Indians. Laws which provide for closure of particular fishing areas or for restrictions on use of certain gear may be reasonable exercises of legislative or administrative discretion and seemingly apply to all persons. However, if they operate to eliminate primarily Indian fishing areas or prohibit fishing with gear used primarily by Indians, the effect is discriminatory.<sup>30</sup>

c. A regulatory scheme which provides for the fulfillment of the needs and objectives of other user groups but which fails to consider Indian needs and the purposes of their treaty reserved rights. Leaving Indians without a classification, effectively excluding them and their needs and rights from the rule making process, while implementing a comprehensive scheme providing for sport and commercial fishing, discriminates against Indians as a class.

#### **IV. A Judicial Determination of Necessity for Conservation Should Precede Enforcement of any State Regulation of Indian Fishing.**

A. Advance determinations of conservation necessity will prevent waste of judicial resources and denial of treaty rights.

The requirement "necessary for conservation" implies, as we have already discussed, a last resort. Thus,

<sup>30</sup> See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); cf. *Tulee v. Washington*, *supra* at 685.

the state must exhaust its regulatory and police power over affairs whose fishing or other activities (pollution, water diversion, stream bed alteration, damming, etc.) interfere with the goal of preserving the depletable resource before imposing regulations on Indian treaty fishing. If the state then can show to the satisfaction of the court that there is no alternative to regulating the relatively minuscule Indian treaty fishery in order to prevent destruction of the fish resource, and that sufficient regulation is not being provided by the tribe's own regulations or those of the federal government, then state regulation may be approved.

This approach contemplates that because regulation of Indian treaty fishing will not be as a matter of course, it will occur only in extraordinary circumstances. In fact an overall reduction of the present burden on the judicial system caused by numerous Indian treaty fishing rights cases is probable. The great expenditure of judicial resources on Indian fishing rights cases is best illustrated by this case which is now concluding its tenth year of continuous litigation over the legality of regulations for fishing seasons long past. The record in the superior court of Washington comprises several thousand pages representing weeks of courtroom proceedings. Two hearings have been held in the state supreme court resulting in reported decisions filling some seventy-five pages. This is the second time this Court has considered essentially the same issues. And the Puyallup Tribe is only one of more than twenty treaty Indian tribes in the State of Washington having fishing rights on rivers throughout the state.

As serious as the tremendous expenditure of judicial resources may be, the gravest effect of the inefficient

system of judicial review of state regulations after they have reached the enforcement stage is upon the tribe and its fishermen. The decade of this case's pendency has been filled with uncertainty for them. As the record here reflects, the state's position has vacillated considerably and now differs tremendously even as between the Departments of Game and Fisheries. In the meantime, Indians who have dared to fish have suffered arrests, loss of valuable gear, and prosecution. There are numerous criminal cases fought each year against Indians in Washington for illegal fishing in which a treaty defense has been asserted. These cases represent only a fraction of the total number of prosecutions of Indians with treaty fishing rights because a complete assertion of a defense based upon treaty rights requires expensive and lengthy litigation which is beyond the financial capabilities of the average citizen, let alone an impecunious Indian fisherman. As stated by the Washington State Supreme Court at the time of its first consideration of this case:

A multiplicity of arrests for violation of fishing regulations, which involve the jailing and detention for considerable periods of individuals and consequent hardship to them and their families, seems to us the unnecessarily hard way of determining whether they have immunity from certain fishing regulations.<sup>40</sup>

Amici need not here take exception with the holding of the Washington State Supreme Court in the decision that is here under review that injunction may be a proper remedy to prevent threatened mass violations of regulations which have been determined to be nec-

<sup>40</sup> *Department of Game v. Puyallup Tribe*, *supra*, 70 Wash.2d at 348, 422 P.2d at 756.



essary for conservation. It is sufficient to urge that the determination of necessity, and hence enforceability must be made by a court in special proceedings for that purpose *before* there is any enforcement or injunction against Indians exercising treaty fishing rights. This would avoid the evils which have resulted in this case—years of Indian treaty fishing prevented by enforcement of state regulations pending a decision on their necessity for conservation. This would depart from the “presumption of validity” which the Washington Supreme Court would attach to administrative determinations of fishing regulations applicable to Indians exercising treaty rights.<sup>41</sup>

**B. A federal court is best suited to interpret Indian treaties and to make determinations of conservation necessity for state regulation.**

As we have shown, a reserved right is measured in terms of what is needed to fulfill the purposes of the reservation. Thus, the propriety of any state regulation affecting Puyallup Indian fishing at usual and accustomed fishing places must be determined in light of the purposes of the Treaty of Medicine Creek. In determining what these purposes are and whether they are being fulfilled, familiar canons of Indian treaty construction must be employed. This Court has often said that it “will construe a treaty with the Indians as ‘that unlettered people’ understood it, and as justice and reason demand. . . .”<sup>42</sup>

Agencies of the state government are ill-suited to engage in such treaty interpretation, to say the least. The Washington State Department of Game has evi-

<sup>41</sup> See *Department of Game v. Puyallup Tribe*, *supra*, 80 Wash.2d at —, 497 P.2d at 179.

<sup>42</sup> *Winans v. United States*, *supra* at 380.



denced its attitude toward Indian fishing by its consistent refusal to recognize any special Indian treaty fishing rights, even after this Court's earlier decision in this case.<sup>43</sup> The juxtaposition of the obdurate refusal of this state agency, which is charged with promulgating fishing regulations, to accept the fact that there is any Indian treaty fishing right at the tribe's usual and accustomed places, with the tribe's strong, and in this case, justified feeling that it has been inhibited in the exercise of rights guaranteed by a federal treaty, creates a familiar scene in Indian affairs. The situation was well characterized by this Court in *United States v. Kagama*, 118 U.S. 375 (1885):

These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States . . . . They owe no allegiance to the States, and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies.<sup>44</sup>

In a situation where the exercise of Indian rights is frequently met with hostility, it is unreasonable to expect that regulation of Indian fishing will be even handed. The state's brief presents arguments which purportedly militate against affording Puyallup Indians the fishing rights for which they bargained. At some length the state discusses the value of steelhead as a sport caught fish compared to its value for food, "recreational" and "aesthetic values associated with the sport angling activities," the extent of the Game Department's planting program, and other matters

<sup>43</sup> See, e.g., Brief for the Department of Game, Appellant, p. 17.

<sup>44</sup> 118 U.S. at 384. Concerning the special problems of Western Washington Indian treaty fishermen see Chapter V, American Friends Service Committee, *Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup, and Nisqually Indians* (1970).

irrelevant to regulating for conservation. These arguments depart considerably from the touchstone of conservation necessity which this Court found to be a prerequisite for imposition of state regulatory power.

The Washington State Supreme Court seemingly has accepted the administrative agency's reverence for sport fishing in its decision that no Indian fishing will be permitted if all of the fish can be taken by sport fishermen. The state court has consistently upheld the concept of state ownership of game within its boundaries. In a recent case involving the treaty fishing rights of members the amicus Muckleshoot Tribe it stated:

Fish, while in a state of freedom, are the property of the sovereign power in whose waters the fish are, and the state owns the fish in its sovereign capacity as the representative of and for the benefit of all people in common.<sup>45</sup>

Although this Court has rejected the "ownership" theory as "but a fiction,"<sup>46</sup> the Washington court continues to apply it, even to deny the fishing rights of Indian treaty fishermen.

Enforcement of regulations of Indian treaty fishing in the atmosphere which exists in Washington without a prior court review invites continued deprivation of rights secured by treaty. Such court review is most

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<sup>45</sup> *State v. Moses*, *supra*, 79 Wash.2d at 113, 483 P.2d at 837. This proposition was recently reaffirmed by the state supreme court in a case not involving Indian fishing, but citing *Moses* with approval. *Washington Kelpers Ass'n v. State of Washington*, 81 Wash.2d 410, 502 P.2d 1170 (1973), *cert. denied* — U.S. —, 41 U.S.L.W. 3608 (U.S. May 14, 1973).

<sup>46</sup> *Toomer v. Witsell*, 334 U.S. 385, 402 (1948).

appropriately the task of a federal court. The interposition of the federal judiciary in the state administrative process where Indian treaty secured fishing rights are involved is entirely appropriate: interpretation of the effect of treaties with the United States is a federal question.<sup>47</sup> This is true no less with Indian treaties than it is with international treaties. And federal jurisdiction over rights reserved by Indian tribes in treaties with the federal government are matters with which the federal judiciary is particularly concerned. Thus, the forum for determining the propriety of state fishing regulations should be a federal court. Reposing this task in a federal court will contribute to a resolution of the problem of overlapping regulatory jurisdiction as between tribal, federal and state governments and will result in an overall reduction in court congestion.

### CONCLUSION

The holding of the Washington State Supreme Court relegating Indians having special treaty fishing rights to a position subordinate even to persons without such rights, and allowing a total prohibition of Indian net fishing for steelhead, should be reversed. As the su-

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<sup>47</sup> 28 U.S.C. §§ 1331 and 1362 provide Indians with access to federal courts in cases arising "under the Constitution, laws, or treaties of the United States." Cf. *Great Lakes Inter-Tribal Council v. Voight*, 309 F.Supp. 60, 64 (W.D. Wis. 1970) where the court stated:

To require exhaustion of state remedies, or to abstain from the exercise of jurisdiction until the state has undertaken to clarify the applicability of its fish and game laws to plaintiffs on Indian lands, would be to dilute the Congressional intention to provide Indians with a federal forum for just such questions as those presented here.

perior court found, there was no showing by the state that the prohibition of Indian fishing was necessary for conservation. Any showing that a new state regulation restricting Indian fishing is necessary for conservation requires that there be a determination prior to enforcement that:

1. Conservation needs will not be met by tribal or federal regulations;
2. Regulation of Indians is a last resort after state attempts to meet conservation needs by the exercise of its regulatory powers over others.

Amici specially ask that this Court take notice of the gross deprivation of fishing rights which results from continued enforcement of state regulations which restrict Indian treaty fishing during prolonged litigation challenging those regulations. To avoid this unconscionable result, prior court approval of such state regulation should be required. The courts with unquestionable jurisdiction to do the job are the federal courts.

Respectfully submitted,

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NATIVE AMERICAN RIGHTS FUND  
*Of Counsel*

June, 1973

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 327.

## SUPREME COURT OF THE UNITED STATES

### Syllabus

#### DEPARTMENT OF GAME OF WASHINGTON

v. PUYALLUP TRIBE, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 72-481. Argued October 10, 1973—Decided November 19, 1973\*

Commercial net fishing by Puyallup Indians, for which the Indians have treaty protection, *Puyallup Tribe v. Dept. of Game*, 391 U. S. 392, forecloses the bar against net fishing of steelhead trout imposed by Washington State Game Department's regulation, which discriminates against the Puyallups, and as long as steelhead fishing is permitted, the regulation must achieve an accommodation between the Puyallups' netfishing rights and the rights of sports fishermen. Pp. 2-6.

80 Wash. 2d 561, 497 P. 2d 171, reversed and remanded.

DOUGLAS, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, in which BURGER, C. J., and STEWART, J., joined.

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\*Together with No. 72-746, *Puyallup Tribe v. Department of Game of Washington*.

NOTE: Where it is feasible, a syllabus (headnote) will be prepared as a brief summary of the court's opinion. The syllabus is prepared by the Reporter of Decisions for the Court and does not constitute an official part of the opinion. The syllabus is prepared by the Reporter of Decisions for the Court and does not constitute an official part of the opinion.

# SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF GAME OF WASHINGTON v. BUYALL TRIBE, INC. ET AL.

PETITION FOR A WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 12-481. Argued October 10, 1973. Decided November 19, 1973.

On October 10, 1973, the Supreme Court of the State of Washington granted a writ of habeas corpus to the respondents, Buyall Tribe, Inc. et al., from the Department of Game of Washington.

The respondents, Buyall Tribe, Inc. et al., are a group of individuals who claim to be members of the Buyall Tribe, a tribe that is recognized by the State of Washington.

The respondents claim that they are entitled to the same rights and privileges as other tribes recognized by the State of Washington.

The respondents claim that the Department of Game of Washington has violated their rights and privileges by denying them the same rights and privileges as other tribes.

The respondents claim that the Department of Game of Washington has acted in an arbitrary and capricious manner in denying them the same rights and privileges as other tribes.

The respondents claim that the Department of Game of Washington has acted in an unconstitutional manner in denying them the same rights and privileges as other tribes.

The respondents claim that the Department of Game of Washington has acted in a discriminatory manner in denying them the same rights and privileges as other tribes.

The respondents claim that the Department of Game of Washington has acted in a retaliatory manner in denying them the same rights and privileges as other tribes.

The respondents claim that the Department of Game of Washington has acted in a punitive manner in denying them the same rights and privileges as other tribes.

The respondents claim that the Department of Game of Washington has acted in a vindictive manner in denying them the same rights and privileges as other tribes.

The respondents claim that the Department of Game of Washington has acted in a malicious manner in denying them the same rights and privileges as other tribes.



NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, so that corrections may be made before the preliminary print goes to press.

## **SUPREME COURT OF THE UNITED STATES**

**Nos. 72-481 AND 72-746**

Department of Game of the  
State of Washington,  
Petitioner,

72-481

v.

The Puyallup Tribe et al.

Puyallup Tribe, Petitioner,  
72-746

v.

Department of Game of the  
State of Washington.

On Writ of Certiorari to  
the Supreme Court of  
Washington.

[November 19, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1963 the Department of Game and the Department of Fisheries of the State of Washington brought this action against the Puyallup Tribe and some of its members, claiming they were subject to the State's laws that prohibited net fishing at their usual and accustomed places and seeking to enjoin them from violating the State's fishing regulations. The Supreme Court of the State held that the tribe had protected fishing rights under the Treaty of Medicine Creek and that a member who was fishing at a usual and accustomed fishing place of the tribe may not be restrained or enjoined from doing so unless he is violating a state statute or regulation "which has been established to be reasonable and necessary for the conservation of the fishing." 70 Wash. 2d 245, 262, 422 P. 2d 754, 764.



On review of that decision we held that, as provided in the Treaty of Medicine Creek, the "right of taking fish, at all usual and accustomed grounds and stations [which] is . . . secured to said Indians, in common with all citizens of the Territory" extends to off-reservation fishing but that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." 391 U. S., at 335, 338. We found the state court decision had not clearly resolved the question whether barring the "use of cut nets in fresh water streams or at their mouths" by all, including Indians, and allowing fishing only by hook and line in these areas was a reasonable and necessary conservation measure. The case was remanded for determination of that question and also "the issue of equal protection implicit in the phrase in common with" as used in the Treaty. *Id.*, 401-403.

In Washington the Department of Fisheries deals with salmon fishing while steel head trout are under the jurisdiction of the Department of Game. On our remand the Department of Fisheries changed its regulation to allow Indian net fishing for salmon in the Puyallup River (but not in the bay nor in the spawning areas of the river). The Department of Game, however, continued its total prohibition of net fishing for steel head trout. The Supreme Court of Washington upheld the regulations imposed by the Department of Fisheries which as noted were applicable to salmon; and no party has brought that ruling back here for review. The sole question tendered in the present cases concerns the regulations of the Department of Game concerning steel head trout. We granted the petitions for certiorari. — U. S. —.

The Supreme Court of Washington, while upholding the regulations of the Department of Game prohibiting fishing by net for steel head in 1970, 80 Wash. 2d 561, 497 P. 2d 171, held (1) that new fishing regulations for the Tribe must be made each year, supported by "facts and data that show the regulation is necessary for the conservation" of the steel head; (2) that the prohibition of net fishing for steel head was proper because "the catch of the steel head sports fishing alone in the Puyallup River leaves no more than a sufficient number of steel head for escapement necessary for the conservation of the steel head fishing in that river." *Id.*, at 573.

The ban on all net fishing in the Puyallup River for steel head<sup>1</sup> grants in effect the entire run to the sports fishermen. Whether that amounts to discrimination under the Treaty is the central question in these cases.

We know from the record and oral argument that the present run of steel head trout is made possible by the planting of young steel head trout called smolt and that the planting program is financed in large part by the license fees paid by the sports fishermen. The Washington Supreme Court said:

"Mr. Clifford J. Millenback, Chief of the Fisheries Management Division of the Department of Game, testified that the run of steelhead in the Puyallup River drainage is between 16,000 and 18,000 fish annually; that approximately 5,000 to 6,000 are native run which is the maximum the Puyallup system will produce even if undisturbed; that approximately 10,000 are produced by the annual hatchery plant of 100,000 smolt; that smolt, small

<sup>1</sup>"ANNUAL CATCH LIMIT—STEELHEAD ONLY: Thirty steelhead over 20" in length . . ." 1970 Game Fish Seasons and Catch Limits, 3 (Dept. of Game).

steelhead from 6 to 9 inches in length, are released in April, and make their way to the sea about the first of August; that during this time all fishing is closed to permit their escapement; that the entire cost of the hatchery smolt plant, exclusive of some federal funds, is financed from licensee fees paid by sports fishermen. The record further shows that 61 per cent of the entire sports catch on the river is from hatchery planted steelhead; that the catch of steelhead by the sports fishery, as determined from "card count" received from the licensed sports fishermen, is around 12,000 to 14,000 annually;<sup>2</sup> that the escapement required for adequate hatchery needs and spawning is 25 per cent to 50 percent of the run; that the steelhead fishery cannot therefore withstand a commercial fishery on the Puyallup River." 80 Wash. 2d, at 572.

At oral argument counsel for the Department of Game represented the catch of steel head that were developed from the hatchery program were in one year 60% of the total run and in another 80%. And he stated that approximately 80% of the cost of that program was financed by the license fees of sports fishermen. Whether that issue will emerge in this ongoing litigation as a basis for allocating the catch between the two groups, we do not know. We mention it only to reserve decision on it.

At issue presently is the problem of accommodating net fishing by the Puyallups with conservation needs of the river. Our prior decision recognized that net fishing by these Indians for commercial purposes was covered by the Treaty. 391 U. S. 398-399. We said that "the

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<sup>2</sup> The Washington Supreme Court noted "that substantially all the steel head fishing occurs after their entrance into the respective rivers to which they return." 80 Wash. 2d, at 575.

manner of fishing, the size of the take, the restriction of commercial fishing and the like may be regulated by the State in the interest of conservation, provided the regulation . . . does not discriminate against the Indians." *Id.*, 398. There is discrimination here because all Indian net fishing is barred and only hook and line fishing, entirely pre-empted by non-Indians, is allowed.

Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook and line fishermen now catch all the steel head which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steel head that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook and line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.

The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.

We do not imply that these fishing rights persist down to the very last steel head in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steel head is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steel head from following the fate of the passenger

pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steel head until it enters their nets.

We reverse the judgment below insofar as it treats the steel head problem and remand the case for proceedings not inconsistent with this opinion.

*So ordered.*

# SUPREME COURT OF THE UNITED STATES

Nos. 72-481 AND 72-746

Department of Game of the  
State of Washington,  
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72-481 v.

The Puyallup Tribe et al.

Puyallup Tribe, Petitioner,  
72-746 v.

Department of Game of the  
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On Writ of Certiorari to  
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Washington.

[November 19, 1973]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, concurring in the opinion and judgment.

I agree that consistently with the Treaty commercial fishing by Indians cannot be totally forbidden in order to permit sports fishing in the usual volume. On the other hand, the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen. The opinion below, as I understand it, indicates that the river, left to its own devices, would have an annual run of 5,000 or 6,000 steelhead. It is only to this run that Indian Treaty rights extend. Moreover, if there were no sports fishing and no state-planted steelhead, and if the State, as the Court said it could when this case was here before, may restrict commercial fishing in the interest of conservation, the Indian fishery cannot take so many fish that the natural run would suffer progressive depletion. Because the Court's opinion appears to leave room for this approach and for substantial, but fair, limits on the Indian commercial fishery, I am content to concur.